placed on a sign in a sex offender's front yard in response to a sentence of probation[4] (what the state district court described at trial as an improper "obvious threat to the jury," see **Appendix B** at B11, and what the Fifth Circuit described as a "thinly veiled threat," **Appendix A** at A19), **Appendix B** at B10-B14;

(2) counsel's failure to take any efforts to even attempt to keep out of evidence that portion of Petitioner's forty page statement to a defense retained expert regarding his past, extensive **use and dealings** of illegal drugs (including cocaine, marijuana and methamphetamine), all of which occurred at least ten years prior to his arrest and were previously unknown to the prosecutor, **Appendix B** at B14-B17;

(3) counsel's failure to object to the introduction of photographs of bestiality seized from Petitioner's computer, **Appendix B** at B17;

(4) counsel's failure to object to testimony elicited by the prosecutor regarding the fact that no Williamson County jury had ever previously granted probation in an aggravated sexual assault case,[5] **Appendix B** at B18; and

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[4] The question was: "Have you ever had a Judge that would require not only the sign be put out there (in front of a sex offender probationer's house) but the names and addresses and phone numbers of the jury members that gave him the probation . . . ?" 3 S.F. 305 (explanation added). This question was repeated a second time by the prosecutor, with slight rephrasing.

[5] The State offered one rebuttal witness, Marty Griffith, Assistant Director of the Probation Department for Williamson County. 4 S.F. 599. **Without objection by trial counsel**, Griffith testified that, out of over 4,100 people currently on probation in Williamson County, none were on probation **granted by a jury** for aggravated sexual assault. 4

(Continued on following page)

(5) counsel's failure to object to improper jury argument by the prosecutor, including a religious "millstone" argument.[6] **Appendix B** at B19-B22.

As noted above, the Fifth Circuit upheld essentially all five factual bases upon which the District Court found Petitioner's counsel performance deficient.[7]

Applying *Strickland's* prejudice prong, the Fifth Circuit employed the "**significantly less harsh**" sentence test originally pronounced in *Spriggs*. **Appendix A** at A32 n.55. The Fifth Circuit recognized that, because of this Court's pronouncement in *Glover*, it had previously questioned the

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S.F. 600. He further testified, again **without objection by trial counsel**, "I am not aware of any probation being granted by a jury here in Williamson County since I've been here for the past eighteen years." 4 S.F. 601.

[6] Although Petitioner complained that counsel's failure to object to two different arguments was ineffective, the Fifth Circuit only found deficient the failure to object to the religious "millstone" argument. 5 S.F. 641-43; **Appendix A** at A27-32. As reflected by the Fifth Circuit opinion, **Appendix A** at A31 n.52, the "millstone" argument is clearly improper. The argument here was not merely rhetorical flourish, but an attempt to convey very forcefully to the jury that Jesus was of the opinion that Petitioner should receive the harshest available punishment, without any consideration of his prospects for rehabilitation or contrition. This argument played to the religious bias of the jurors, injected new "facts" about Jesus' life and opinions without any invitation, and invited the jurors to abandon their legal duty under the laws of Texas to weigh *all of the facts relevant to punishment*.

[7] As to the first numbered factual basis, the Fifth Circuit partially disagreed with the District Court, finding counsel's failure to move for a mistrial not deficient, but finding counsel's failure to seek a curative instruction deficient. **Appendix A** at A15-19. The Fifth Circuit agreed with the District Court as to the second, third and fourth factual bases. **Appendix A** at A19-A24; A24-A26; A26-A27. And, as reflected in footnote 6, *supra*, it partially agreed with the District Court, finding counsel's failure to object to one of the two arguments deficient. **Appendix A** at A27-A32.

continued viability of *Spriggs* in *United States v. Ridgeway*, 321 F.3d 512, 515 n.2 (5th Cir. 2003), *cert. denied*, 528 U.S. 977 (1999). It also recognized that another Fifth Circuit panel had recently reaffirmed the use of *Spriggs* in *United States v. Grammas*, 376 F.3d 433, 437-38 n.4 (5th Cir. 2004). **Appendix A** at A32 n.5. The Fifth Circuit concluded that, since it could not overrule another panel opinion absent intervening Supreme Court precedent, *Spriggs'* "significantly less harsh" sentence test had to be utilized. It thus rejected Petitioner's contention that *Glover* should be used.[8] **Appendix A** at A32 n.55.

The Fifth Circuit then addressed Petitioner's argument regarding the cumulative, prejudicial effect of trial counsel's errors stating, in pertinent part:

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[8] At no time has Respondent Dretke raised a defense that application of *Glover* to Petitioner would be barred as a "new rule" by *Teague v. Lane*, 489 U.S. 288 (1989). Accordingly, a *Teague* bar is not available to Respondent. *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (citing *Parke v. Raley*, 506 U.S. 20, 26 (1992), and *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)). Assuming, arguendo, this Court grants certiorari and also determines that a *Teague* bar is "fairly presented" within Petitioner's Questions Presented, it should be realized that there is a conflict between the Courts of Appeals regarding whether *Glover* is a "new rule." Compare *Daniel v. Cockrell*, 293 F.3d 697, 705-06 (5th Cir. 2002) (holding that *Glover* announced a "new rule" barred by *Teague* from retroactive application) with *United States v. Horey*, 333 F.3d 1185, 1188 (10th Cir. 2003) (agreeing with *Taylor v. Gilkey*, 314 F.3d 832, 834 (7th Cir. 2002), that *Glover* does not announce a "new rule" but instead clarifies the long-standing standards for analyzing the long-standing right of effective counsel). *See also Greenup v. State*, 2002 WL 31246136 at *3 (Tenn. Crim. App. 2002) (holding that *Glover* did not state a new rule of law under *Teague*).

As discussed below, this Court applied the "any amount of jail time" test to Glover on collateral review in a motion to vacate under 28 U.S.C. § 2255, without any discussion of *Teague*, thus supporting the conclusion that this Court did not believe that *Glover* presented a "new rule" within the meaning of *Teague*.

> Considering this evidence in the first instance, we may be persuaded that but-for these errors, Ward would have received a significantly less harsh sentence. Our task under the AEDPA, however, is that of determining whether the state habeas court's application of the law to the facts was reasonable. Importantly, in order to grant habeas relief from a state court conviction following rejection of the petitioner's state habeas application, we must conclude that the state habeas court's application of federal law was not only incorrect, but "objectively unreasonable."
>
> With respect to prejudice, the state habeas court held that "given the severity and number of the offenses and the strength of the evidence [against Ward], there is no reasonable probability that the outcome would have been different." While we may take issue with the *correctness* of this determination, we cannot say that it constitutes an objectively unreasonable application of federal law to the facts of this case. . . . **Given the seriousness of the offenses to which Ward pleaded guilty, a reasonable probability exists that he may receive a *more harsh* sentence if he were granted a new trial as to punishment.** In short, looking as we must through the prism of AEDPA deference, we decline to disturb the state habeas court's determination that Ward was not prejudiced.

Appendix A at A34-A36 (footnote omitted) (bold emphasis added).

Petitioner disagreed with the Fifth Circuit's conclusion, even employing the "significantly less harsh" test,[9] and therefore filed a motion for rehearing and a suggestion for rehearing in banc. Therein, Petitioner sought to convince the Fifth Circuit that it should grant en banc review to resolve the clear conflict between the continued use of *Spriggs'* "significantly less harsh" test and *Glover's* "any amount of jail time" test in the context of a jury trial on punishment in state court. The Fifth Circuit denied the motion for panel rehearing and the suggestion for en banc review. **Appendix C**. In so doing, Judge Higginbotham clearly acknowledged the conflict between the panel's reliance on *Spriggs* in light of *Glover*, but reasoned that the determination of this issue was for this Court, stating that "absent a more compelling instruction from the

[9] Not only did the state habeas court adopt **verbatim** the State's proposed "conclusion of law" regarding prejudice, the state habeas court never considered, analyzed, or addressed the fact that, but for counsel's ineffectiveness, substantial, prejudicial evidence and arguments would not have been heard by the jury. This failure to assess the impact of the prejudicial evidence and arguments on the jury that assessed Petitioner's punishment demonstrates the unreasonableness of the state courts' decision. No rational jurist could conclude that Petitioner's jury would not have likely assessed a lesser punishment had it not heard that evidence and argument which, but for counsel's ineffectiveness, should not have been adduced. The state courts failed to consider cumulative prejudice. *See, e.g., United States v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992); *Taylor v. Kentucky*, 436 U.S. 478, 487 n15 (1978) (cumulative effect of potentially damaging evidence violated due process); *Kyles v. Whitley*, 514 U.S. 419, 451-54 (1995). Additionally, they included in their assessment of the strength of the evidence the very evidence which should have been excluded had trial counsel not been deficient, reinforcing the unreasonableness of their analysis.

Supreme Court, we decline to reconsider the *Spriggs* approach at this time." **Appendix C** at C5.[10]

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's "Significantly Less Harsh" Sentence Test Conflicts With This Court's Decisions In *Strickland v. Washington* and *Glover v. United States*.

The Sixth Amendment to the Constitution of the United States requires that a criminal defendant be afforded effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). "The right to effective assistance" "is the right to require the prosecution's case to survive the crucible of meaningful adversary testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Generally speaking, to demonstrate ineffective assistance of counsel, a defendant must show that: (1) trial counsel's performance was deficient; and (2) the defendant was prejudiced by his counsel's performance. *Strickland*, 466 U.S. at 688-92. In *Strickland*, this Court stated the following regarding the prejudice prong:

[10] The Fifth Circuit also failed to address Petitioner's contention that its conclusion that "[g]iven the seriousness of the offenses . . . a reasonable possibility exists that he may receive a *more harsh* sentence if he were granted a new trial as to punishment," **Appendix A** at 35-36 (emphasis in original), was **contrary** to *Strickland* because the relevant inquiry was whether there was a reasonable probability that the jury that assessed punishment at the trial would have assessed a lesser sentence but for counsel's unprofessional acts and omissions.

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. **A reasonable probability is a probability sufficient to undermine confidence in the outcome.**

Id. at 694 (emphasis added).

Strickland's prejudice standard has been reaffirmed by this Court in the context of capital sentencing hearings. *See, e.g., Rompilla v. Beard*, 125 S.Ct. 2456, 2469 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).[11] This Court has announced that although the prejudice standard requires a "case-by-case examination of the evidence," such an approach does not "obviate[ ] . . . the clarity of the rule." *Id. Williams*, 529 U.S. at 391 (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment)).

In *Glover v. United States*, 531 U.S. 198, 203 (2001), the defendant was tried and convicted in federal court for various racketeering, money laundering, and tax evasion

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[11] In *Strickland*, *supra* at 686, this Court also stated that it "need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance." This Court went on to state that "[a] capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the use of standards for discretion (citations omitted) that counsel's role in the proceedings is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing discretion." *Id. See also Caspari v. Bohlen*, 510 U.S. 383, 393 (1994) (noting that *Strickland* "left open the question whether the [*Strickland*] test would apply to noncapital cases.").

charges. Glover was sentenced under the United States Sentencing Guidelines, and trial and appellate counsel failed to raise any issues regarding the "grouping" of counts. The direct appeal was affirmed. *United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996). After the conclusion of the direct appeal, Glover filed a pro se motion to correct his sentence under 28 U.S.C. § 2255, arguing that his counsel had rendered prejudicial, deficient performance regarding the failure to object to the no "grouping" of counts recommended by the probation officer in the pre-sentence investigation report. According to Glover's pro se motion, his counsel's deficient performance resulted in a sentence that was 6 months to 21 months more than it otherwise should have been. The district court denied the collateral attack on his sentence under Seventh Circuit precedent because the increase of 6 to 21 months was not sufficiently significant to amount to "**prejudice**" for purposes of *Strickland*. The Seventh Circuit affirmed. On certiorari, this Court stated:

> Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.

531 U.S. at 203.

This Court also observed:

> The Seventh Circuit's rule is not well considered in any event, because there is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice. Indeed, it is not even clear if the relevant increase is to be measured in absolute terms or by some fraction of the total

> authorized sentence. See *Martin v. United States*, 109 F.3d 1177, 1183 (C.A.7 1996) (ROVNER, J., dissenting from denial of rehearing en banc). Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a determinate system of constrained discretion such as the Sentencing Guidelines it cannot serve as a bar to a showing of prejudice. Compare *Spriggs v. Collins*, 993 F.2d 85, 88 (C.A.5 1993) (requiring a showing that a sentence would have been "*significantly* less harsh" under the Texas discretionary sentencing scheme), with *United States v. Phillips*, 210 F.3d 345 (C.A.5 2000) (finding prejudice under the Sentencing Guidelines when an error by counsel led to an increased sentence). We hold that the Seventh Circuit erred in engrafting this additional requirement onto the prejudice branch of the *Strickland* test. This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, if it had been error, would have been correctable on appeal. **We express no opinion on the ultimate merits of Glover's claim because the question of deficient performance is not before us, but it is clear that prejudice flowed from the asserted error in sentencing.**

531 U.S. at 204 (bold emphasis added).

Pursuant to *Glover*, prejudice is shown in a non-capital sentencing hearing when there is a reasonable probability that, but for counsel's deficient performance,

actual jail time would have been less. The amount of additional jail time is not an appropriate inquiry for the prejudice prong, but rather is a factor that is to be considered in the context of whether counsel's act or omission was deficient. Of course, *Glover* dealt with a mandatory version of the United States Sentencing Guidelines, not the current "advisory" version.[12]

Almost a decade after *Strickland* and eight years prior to *Glover*, the Fifth Circuit first held that, in order to demonstrate prejudice in a non-capital sentencing proceeding, a defendant "must demonstrate a reasonable probability that, but for his counsel's actions, he would have received a '**significantly less harsh**' sentence." *Spriggs v. Collins*, 993 F.2d 85, 87 (5th Cir. 1993) (emphasis added). *Spriggs* was a murder case in which the range of punishment was from 5 to 99 years or life. The Fifth Circuit stated the following regarding sentencing prejudice when the defendant was sentenced to 35 years by a judge (not a jury) based on allegedly inaccurate information in the presentence investigation report:

> In order to avoid turning *Strickland* into an automatic rule of reversal in the non-capital sentencing context, we believe that in deciding such an ineffectiveness claim, a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been *significantly* less harsh. [FN4] In deciding whether such prejudice occurred, a court should consider a

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[12] *See United States v. Booker*, 125 S.Ct. 738, 756-57 (2005) (remedial majority opinion).

number of factors: the actual amount of the sentence imposed on the defendant by the sentencing judge or jury; the minimum and maximum sentences possible under the relevant statute or sentencing guidelines, the relative placement of the sentence actually imposed within that range, and the various relevant mitigating and aggravating factors that were properly considered by the sentencer.

FN4. "Significance" is a relative term here. **Of course, it is arguable that *any* amount of liberty of which a person is unnecessarily deprived is "significant." However, our reading of the Supreme Court's capital ineffectiveness jurisprudence leads us to believe that "prejudice" must be rather appreciable before a new trial is warranted in view of counsel's error.** *See, e.g., Lockhart v. Fretwell,* 506 U.S. 364 [] (1993); *Burger v. Kemp,* 483 U.S. 776 [] (1987); *Strickland v. Washington, supra.* If an appreciable showing of prejudice is required in the *capital* context, a requirement for a showing of significant prejudice applies *a fortiori* in the non-capital context. *See Woodson v. North Carolina,* 428 U.S. 280, 305 [] (1976) (joint opinion of Stewart, Powell & Stevens, JJ.) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). We note that one foreseeable exception to this requirement would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing – such as an automatic increase for a "career" offender or an enhancement for use of

> a handgun during a felony – which would have not occurred but for counsel's error.

Spriggs, 993 F.2d at 88-89 (bold emphasis added).[13]

The Fifth Circuit's utilization of its "significantly less harsh" sentence standard is inconsistent with *Strickland* and *Glover*. The rationale employed by this Court in *Glover* compels the conclusion that the Fifth Circuit seriously erred by its blind adherence to *Spriggs* in the present case. Indeed, *Glover* reflects that this Court rejected the essence of the Fifth Circuit's reasoning in *Spriggs* that prejudice must be "substantial."

The determination of prejudice is not an outcome determinative test, but rather whether there is a "reasonable probability" sufficient to "undermine confidence" in the outcome of the sentencing proceeding. *See Strickland*, *supra*, at 694.[14] The underlying principle of *Strickland*

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[13] *Williams v. Taylor* explicitly rejects the *Lockhart* test, or at least this misapplication of *Lockhart*, which is only relevant where a defendant seeks a windfall benefit. *Williams*, 529 U.S. at 391-96.

[14] The Fifth Circuit's acceptance of Respondent's argument that the "well-known abhorrence expressed by Williamson County juries towards sex offenders guaranteed a lengthy sentence," **Appendix A** at A33, and its conclusion that "a reasonable possibility exists that he may receive a more harsh sentence if he were granted a new trial," **Appendix A** at A36, are fatally flawed in two respects. First, Respondent's argument about Williamson County juries is directly **contrary** to *Strickland*, wherein this Court stated:

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. **It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent,**

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contemplates an evaluation of fundamental fairness: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Despite the clear, unavoidable conclusion that the sentencing hearing could not have produced a "just result" due to the introduction of inadmissible, prejudicial evidence (bestiality, drug use, drug distribution), a "thinly veiled" threat (that would logically repel any consideration of Petitioner's eligibility and fitness for probation) coupled with additional inadmissible evidence that no jury had ever before given probation in Williamson County in this type of case, and the prosecutor's religious "millstone" argument (that has been held to be reversible

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may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

Strickland, 466 U.S. at 695 (emphasis added).

Second, the issue is not what a new jury would do at a resentencing, but whether there is a **reasonable probability** that but for counsel's deficient performance, Petitioner's jury would have imposed a lesser (or significantly lesser, under *Spriggs*) punishment at his trial. Given the vast array of prejudicial evidence, coercive threats, and improper argument counsel's deficient performance allowed the jury to hear and see, there is a reasonable probability that had the jury not seen and heard those matters, it would have sentenced Petitioner to a lesser sentence. No other possible, rational conclusion exists. Thus, the instant case is contrary to and an unreasonable application of *Strickland*.

error in every jurisdiction that has addressed it[15]), the Fifth Circuit disregarded this Court's clear teaching that the amount of jail time was not relevant to the prejudice inquiry by adhering to its decision in *Spriggs*. Moreover, the Fifth Circuit's continued utilization of *Spriggs* cannot be reconciled with *Strickland* and *Glover* because it requires a citizen to demonstrate that he received a quantifiably longer amount of jail time than he otherwise would have received but for his counsel's deficient performance when it is legally impossible to quantify. Certiorari should be granted.[16]

2. The Fifth Circuit's "Significantly Less Harsh" Sentence Test Conflicts With Decisions Of Other Federal Courts.

Although this Court has not explicitly held that *Strickland* applies in non-capital sentencing, the lower federal courts have adopted the *Strickland* two-pronged test for that context. *See, e.g.*, *Spriggs*, 993 F.2d at 88 n.3

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[15] *See, e.g.*, *Commonwealth v. Brown*, 711 A.2d 444, 458 (Pa. 1998) (holding the "millstone" argument error per se); *Long v. State*, 883 P.2d 167, 177 (Okla. Crim. App. 1994); *Jones v. Kemp*, 706 F. Supp. 1534, 1559 (N.D. Ga. 1989) (citing *United States v. Giry*, 818 F.2d 120 (1st Cir. 1987), *cert. denied*, 484 U.S. 855 (1987) (reference to Bible is improper appeal to jurors' private religious beliefs)); *Evans v. Thigpen*, 809 F.2d 239 (5th Cir. 1987), *cert. denied*, 483 U.S. 1033 (1987) (biblical evidence irrelevant at sentencing phase). This religious argument also violated the Establishment Clauses of the Federal and Texas constitutions. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Sandoval v. Calderon*, 231 F.3d 1140, 1149-52 (9th Cir. 2000).

[16] Under *Strickland*, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Given the inadmissible, prejudicial and inflammatory evidence and argument that counsel allowed the jury to hear and see, Petitioner's sentencing proceeding can hardly be deemed "fair."

(citing *United States v. Hanger*, 1993 WL 128015 at *1 (4th Cir. April 23, 1993); *United States v. Ray*, 828 F.2d 399, 421 & n.25 (7th Cir. 1987); *Goodrich v. Smith*, 643 F. Supp. 579, 582-83 (N.D. N.Y. 1986) (citing *Janvier v. United States*, 793 F.2d 449, 456 (2nd Cir. 1986), and *State v. Davidson*, 335 S.E.2d 518 (1985)).

Following *Glover*, the Seventh and Tenth Circuit Courts of Appeals have rejected their prior adoption of the *Spriggs* rule for the calculation of non-capital sentencing prejudice. *Durrive v. United States*, 4 F.3d 548, 550-51 (7th Cir. 1993); *United States v. Kissick*, 69 F.3d 1048, 1055-1055-56 (10th Cir. 1995) (adopting *Spriggs*). In *United States v. Horey*, the Tenth Circuit expressly rejected *Spriggs*, asserting that *Spriggs*' "holding and its attendant analysis were abrogated by *Glover*." *United States v. Horey*, 333 F.3d 1185, 1188-89 (10th Cir. 2003). The Seventh Circuit has implicitly rejected *Spriggs*, calculating non-capital sentencing prejudice in a manner that rejects *Spriggs* and *Durrive*. *See Crucean v. United States*, 113 Fed.Appx. 171, 173-74 (7th Cir. 2004).

The other federal circuit courts consistently apply *Strickland's* second prong to non-capital sentencing in a manner consistent with *Glover* and contrary to *Spriggs*. For instance, the Ninth Circuit has observed that "any additional jail time served as a result of deficient performance by counsel is prejudicial." *United States v. Brim*, 148 Fed.Appx. 619 (9th Cir. 2005). *See also Curry v. Palmateer*, 62 Fed.Appx. 157 (9th Cir. 2003) (applying second prong of *Strickland* to error at sentencing in Oregon state court and finding prejudice even without a concrete showing that the sentence would have been less); *United States v. Soto*, 10 Fed.Appx. 226 at 227-28 (4th Cir. 2001); *Weinberger v. United States*, 268 F.3d 346, 352-53 (6th Cir. 2001);

Johnson v. United States, 313 F.3d 815, 817-18 (2nd Cir. 2002) (holding that the failure to object to the computation of the offense level was prejudicial under *Strickland* even when the sentence imposed was within the range as properly calculated, because objection by counsel would have led to a lower total offense level and a reasonable probability that the judge would have sentenced defendant to a lesser sentence); *Jansen v. United States*, 369 F.3d 237, 243-44 (3rd Cir. 2004) (applying the *Strickland* second prong to a failure to object to the issue of personal use in determining relevant conduct in quantity computation of the amount possessed with intent to distribute). Certiorari should be granted because the Fifth Circuit's ongoing use of the *Spriggs* test is an anomaly among the federal circuits, leading to widely diverging results and injustice.

3. The Fifth Circuit Applied A Standard Of Prejudice More Demanding Than That Applied By The State Court And Also Violated Its Duty To Apply "Clearly Established Federal law" Under 28 U.S.C. § 2254(d)(1).

Consistent with this Court's interpretation of *Strickland* in *Glover*, the Texas courts have interpreted *Strickland* to require a finding of prejudice when "there is a reasonable probability that the jury's assessment of punishment in [the] case would have been less severe in the absence of counsel's deficient performance." *Milburn v. State*, 15 S.W.3d 267, 270 (Tex. App. – Houston [14th Dist.] 2000) (citing *Hernandez v. State*, 988 S.W.2d 770, 772-74 (Tex. Crim. App. 1999) (holding

Strickland prejudice prong applies to non-capital sentencing)).[17] In concluding that the state habeas court's conclusion of "no prejudice" was not "objectively unreasonable," the Fifth Circuit did not analyze "prejudice" under *Strickland*, but rather under *Spriggs*. Thus, the Fifth Circuit utilized a more demanding test for prejudice than employed by the Texas state court[18] and this

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[17] Petitioner relied on the second prong of *Strickland* in his state court writ where, at page 41, he cited the following from *Milburn*:

> The sentencing stage of any case, regardless of the potential punishment, is "the time at which for many defendants the most important services of the entire proceeding can be performed." *Milburn*, 15 S.W.3d at 269 (quoting *Vela v. Estelle*, 708 F.2d 954, 964 (5th Cir. 1983)).

It should also be noted that as of 1993 when the Fifth Circuit decided *Spriggs*, Texas had not yet adopted the second prong of *Strickland* for assessing prejudice in a non-capital sentencing context. Rather, at that time (and up until 1999), Texas did not require any showing of prejudice. *See, e.g., Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992) (citing *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980)).

[18] The state habeas court clearly did not employ the *Spriggs* standard utilized by the Fifth Circuit, but rather was required under Texas law to apply the far less restrictive standard recognized by *Hernandez, supra*. Yet, the Fifth Circuit utilized *Spriggs* to determine that the state habeas court's conclusion of "no prejudice" was not objectively unreasonable. Given the contents of footnote 9, *supra*, the state habeas court's conclusion of "no prejudice" was objectively unreasonable under any standard, but much more so under *Hernandez*.

Indeed, in *Milburn v. State, supra*, the court upheld the defendant's claim that his trial counsel's failure to adduce character witnesses at the punishment stage of his non-capital punishment stage jury trial was prejudicial " . . . even though it is sheer speculation that character witnesses in mitigation would have in fact favorably influenced the jury's assessment of punishment. *See Pickens v. Lockhart*, 714 F.2d 1455, 1467 (8th Cir.1983)" . . . because it " . . . deprived [him] of the possibility of bringing out even a single mitigating factor." *Milburn, supra* at 270.

Court.[19] There is no question that a finding of prejudice under *Spriggs* also constitutes prejudice under *Strickland*.[20] The converse, however, is not necessarily true. The Fifth Circuit's finding of "no prejudice" under *Spriggs* does not answer the inquiry under *Strickland*, because *Spriggs* is more demanding than *Strickland*. Application of *Spriggs* is also a violation of the Fifth Circuit's duty under 28 U.S.C. § 2254(d)(1) to apply "clearly established Federal law, as determined by the Supreme Court of the United States," as *Spriggs* is inconsistent with *Strickland*, as interpreted by this Court in *Glover*. Certiorari should be granted to resolve the propriety of the Fifth Circuit's utilization of *Spriggs*, given the state court's utilization of *Strickland* and the mandate of 28 U.S.C. § 2254(d)(1).

4. The Issues Appear To Be Of Nationwide Significance In Federal And State Courts.

In light of *Booker's* declaration that the United States Sentencing Guidelines are now "advisory," the continued applicability of *Glover* arguably becomes questionable

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[19] The Fifth Circuit cannot accurately state that the state habeas court's decision of "no prejudice" is "reasonable" under 28 U.S.C. § 2254(d)(1) if the Fifth Circuit used a more demanding standard of prejudice to interpret *Strickland* than the state court used. Utilization by the Fifth Circuit of a more demanding standard than that used by the state court is a fundamentally unfair application of 28 U.S.C. § 2254(d)(1) that constitutes a separate due process violation and raises serious constitutional issues regarding the proper scope of Article III of the Constitution and the Suspension Clause.

[20] The District Court used *Spriggs* in deciding that the state courts' conclusion of "no prejudice" was an objectively unreasonable application of *Strickland*.

given the Fifth Circuit's utilization of *Spriggs* in this case, post-*Booker*. That is, *Spriggs* was created by the Fifth Circuit to avoid automatic reversal in the context of **discretionary sentencing schemes**. *Glover* destroys the rationale underlying *Spriggs*, but did so in the context of narrow, mandatory guideline sentencings. Despite the clarity of *Glover*, the Fifth Circuit has blindly adhered to *Spriggs* and ignored *Glover*. Now that the United States Sentencing Guidelines have been declared "advisory," a far greater amount of discretion (outside of the context of narrow mandatory sentencing guidelines, due to the need to impose a "reasonable" sentence under 18 U.S.C. § 3553) has been injected into the federal sentencing process. The issue thus arises as to whether this newly recognized discretion, coupled with the Fifth Circuit's continued utilization of *Spriggs*, post-*Glover* and post-*Booker*, will compel the Fifth Circuit to continue to employ *Spriggs*. Given the Fifth Circuit's reasoning in *Spriggs*, that certainly appears to be a distinct possibility.

Furthermore, at least seven states provide for jury sentencing in non-capital felony cases.[21] These seven states thus have broad discretionary sentencing schemes. The other forty-three states (and the District of Columbia) appear to require sentencing by a judge in the first instance, either with or without some type of sentencing guidelines with varying degrees of discretion. *See, e.g.,*

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[21] Six states have historically provided jury sentencing in non-capital felony cases, to wit: Arkansas, Kentucky, Missouri, Oklahoma, Texas, Virginia. *See* Nancy J. King, *The Origins Of Felony Jury Sentencing In The United States*, 78 Chicago-Kent L.Rev. 937 n.2 (2003). Oregon has recently enacted legislation affording jury sentencing in non-capital felony cases. *See* Senate Bill 528 (2005), available on line at http://www.leg.state.or.us/05reg/measpdf/sb0500.dir/sb0528.en.pdf.

Court Organization Statistics, Bureau of Justice Statistics, U.S. Department of Justice at Table 45 (available at http://www.ojp.usdoj.gov/bjs/courts.htm).[22]

CONCLUSION

It is time for this Court to clarify that in the context of state or federal discretionary sentencing schemes in non-capital cases, the Sixth Amendment requires application of the second prong of *Strickland*, as interpreted by *Glover*. Petitioner's sentencing hearing – held before a jury over the course of three days – had every attribute of a trial on guilt and was an adversary proceeding. Accordingly, the reasoning of *Strickland* clearly applies and the Fifth Circuit's concern in *Spriggs* regarding "automatic reversal" has no applicability, particularly given *Glover's* "any amount of jail time" test. The Fifth Circuit's conclusion that the state court's determination of "no prejudice" was

[22] A number of state appellate courts have addressed *Glover*. *See, e.g.*, *People v. Kimble*, 651 N.W.2d 798 (Mich. App. 2002) (noting that in the context of the Michigan sentencing guidelines, *Glover's* any amount of jail time test was instructive in determining whether a sixty month increase in the defendant's sentence due to an erroneous mis-scoring of offense variables constituted plain error); *Greenup v. State*, 2002 WL 31246136 at *3 (Tenn. Crim. App. 2002) (holding that *Glover* did not state a new constitutional rule of law under *Teague v. Lane*, 489 U.S. 288, 301 (1989)); *Evans v. State*, 827 A.2d 157 (Md. App. 2003) (noting that in context of counsel's ineffectiveness from failing to attempt to suppress nine vials of cocaine, prejudice was shown because, *inter alia*, the sentence was enhanced by at least five years); *People v. Manners*, 2004 WL 242920 (Mich. App. 2004) (noting that counsel's failure to object to improper sentencing variables led to a sentencing guideline range of 7 to 23 months as opposed to 0 to 9 months, thus demonstrating that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different).

not "objectively unreasonable" was contrary to and involved an unreasonable application of *Strickland*, as interpreted by *Glover*, thus violating 28 U.S.C. § 2254(d)(1).

PRAYER FOR RELIEF

The petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID BOTSFORD
Counsel of Record

APPENDIX A

420 F.3d 479

United States Court of Appeals,
Fifth Circuit.
Bernard James WARD, Jr., Petitioner-Appellee-Cross-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellant-Cross-Appellee.
No. 03-51352.

Aug. 9, 2005.

David L. Botsford (argued), Law Office of David L. Botsford, Austin, TX, for Bernard James Ward, Jr.

Gretchen Berumen Merenda, Asst. Atty. Gen. (argued), Austin, TX, for Doug Dretke.

Appeals from the United States District Court for the Western District of Texas.

Before REAVLEY, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Claiming that he had received ineffective assistance of counsel, Bernard Ward sought relief under 28 U.S.C. § 2254 from his conviction and sentence by a Texas court for indecency with a child, sexual assault, aggravated sexual assault, and possession of child pornography. The federal district court denied relief as to his conviction, but granted Ward's petition as to his sentence. Ward and the State filed cross-appeals, and the district court granted Ward's motion for COA. We hold that the district court

correctly denied Ward's petition as to his conviction, but erred in granting his petition as to his sentence.

I

In August 1993, Shannon Grant, then age 13, and his mother, Patti Love, moved into a house in Williamson County, Texas. The house was located next door to Bernard Ward, a single male. Ward befriended the family, and began working with Grant in an effort to improve his performance at school. He also encouraged Grant to stop abusing illegal drugs. As their friendship progressed, Ward began allowing Grant to spend the night at his house, purchased time for him on a web-based video game, and took him to Big Bend National Park. In addition to these innocuous activities, Ward allowed Grant to view pornographic videos. Grant also discovered a number of Playboy and Hustler magazines in Ward's attic. Roughly eighteen months into their friendship, Ward encouraged Grant to enter into a sexual relationship with him. The two engaged in sexual acts four or five times, after which Grant refused to participate further.

Roughly one month after these sexual encounters began, Ward leased a room in his house to Grant's best friend, Mike Carta. Carta was 18 years old at the time. Grant also introduced Ward to one of his friends from school, Adam Clouse. Clouse, who was twelve or thirteen years old at the time, began frequenting Ward's house along with Grant. Ward ultimately invited Clouse to participate in sexual activity with him, resulting in a number of sexual encounters over an eight-day period. Finally, Ward was introduced to Chad Wright, another friend of Grant's. Ward made a number of passes at

Wright, and attempted to initiate a sexual encounter. Wright quickly stopped the encounter and refused to participate in further sexual activity with Ward.

When Grant first met Ward, Ward owned a personal computer. Ward allowed Grant access to his personal computer on a regular basis. Eventually, Grant's use of Ward's computer became so excessive that Ward purchased Grant his own computer. Shortly thereafter, Ward discovered the internet and purchased a second new computer for his own use. Ward quickly became addicted to internet pornography, including child pornography and photographs of adult bestiality. He would download files containing pornographic pictures from the internet and store the files in folders marked "Animals, Boy/Girl, Female, Male, Male 10 to 13, Male 13 to 16, Male 7 to 10, Male in Briefs, and Celeb Boys."

Ward attempted to hide his use of internet pornography from the boys who frequented his home, but his furtiveness ultimately piqued the suspicions of Grant and Carta. One day while Ward was away, Grant used a password to log onto Ward's computer, and he and Carta accessed the files containing child pornography and photographs of bestiality. Rightly disgusted and disturbed, Carta reported Ward to the police. On September 24, 1996, Carta spoke with detectives Dan LeMay and Mary Ryle of the Round Rock Police Department and told them that he had observed child pornography on Ward's computer. The next day, LeMay and Ryle accompanied Carta to Ward's house while Ward was away. Carta let them into the house, logged onto Ward's computer, and showed them the child pornography. At that point, LeMay and Ryle turned Ward's computer off and prepared a search warrant. They returned later that day and seized Ward's computer along

with pornographic videos, magazines, condoms and K-Y Jelly. Ward was arrested on charges of possessing child pornography and was subsequently released after posting bond.

On September 27, Clouse went to the Round Rock Police Department and informed LeMay that Ward had sexually assaulted him on numerous occasions. Further investigation revealed the abuse of Grant and Wright. Ward was arrested again and indicted for possession of child pornography, indecency with a child, and multiple counts of sexual assault, and charged in a second indictment with multiple counts of aggravated sexual assault. Ward elected to have a jury assess punishment in both cases, and filed a motion to suppress evidence based upon an illegal search.

During this time, Ward's counsel, Hugh Lowe, devised a defense strategy aimed at securing either probation or the most lenient prison sentence possible. As part of this strategy, Lowe sought to have the cases against Ward consolidated into a single trial. The prosecutor agreed to consolidate in exchange for a guilty plea, a confession from Ward, and the name of Ward's testifying expert. Ward agreed to plead guilty, and Lowe disclosed the name of Ward's expert, Dr. Collier Cole, a psychologist specializing in the treatment of sex offenders. Dr. Cole had treated Ward for seven months prior to his trial. Lowe also declined to pursue the earlier filed suppression motion.

In addition to taking these steps, Lowe determined that a posture of complete openness was the proper approach to take at Ward's sentencing. Prior to trial, Lowe had Ward prepare a lengthy written statement detailing his life up to the point of his incarceration. The statement

included Ward's account of the charged offenses, a summary of his employment history, an account of his troubled childhood, and a summary of his use and sale of illegal drugs many years before trial. Lowe provided the written statement to Dr. Cole with the knowledge that it would be subpoenaed by the State.[1]

Pursuant to his openness strategy, Lowe also failed to object when the State sought to admit photographs of bestiality that were stored on Ward's computer. Neither did he object when the prosecutor solicited testimony that of the 4,100 probationers in Williamson County, not one was on probation granted by a jury for aggravated sexual assault.

Lowe did lodge an objection when, in response to testimony by Dr. Cole that it was not uncommon for a sex offender to be required to place a sign in his yard announcing his status, the prosecutor inquired whether a judge had ever required that the names, addresses and telephone numbers of jurors be placed on the sign if they gave the sex offender probation. However, Lowe opted not to request a curative instruction or move for a mistrial.

Lowe's passive approach continued throughout the State's closing argument, during which the prosecutor made a number of inflammatory remarks. The prosecutor quoted extensively from the Bible and discussed attitude about crime in Williamson County compared to that in

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[1] When the subpoena was served, Dr. Cole faxed a copy of it to Lowe. Lowe failed to respond to this fax and declined to claim attorney-client or work product privilege. The statement was copied and ultimately provided to the prosecution.

other putatively less hospitable Texas counties. Lowe failed to object to these statements.

Following deliberation, the jury returned a verdict of four concurrent 20-year sentences, one 10-year sentence, three concurrent 60-year sentences for aggravated sexual assault, and a number of fines. Ward's sentence was affirmed on direct appeal, and his petition for discretionary review was denied.[2] On November 27, 2000, Ward filed a state habeas application alleging ineffective assistance of counsel. The State responded by filing a one-page general denial and an affidavit by Lowe. Ward's application was considered by the same judge who presided over his trial. After making findings of fact and conclusions of law, the judge recommended that relief be denied.[3] The Texas Court of Criminal Appeals denied relief without issuing a written opinion.

Ward filed a petition under 28 U.S.C. § 2254 in the District Court for the Western District of Texas, Austin Division. The federal magistrate recommended that all relief be denied. Oral argument was then held before the district court. The court denied relief on Ward's claim that his trial counsel was ineffective in failing to challenge the search and seizure of his computer files prior to his guilty plea, finding that this claim was barred because he had not made a showing that his plea was involuntary.[4]

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[2] *Ward v. State*, Nos. 03-97-657-CR & 03-97-658-CR, 1999 WL 125404 (Tex.App. – Austin Mar. 11, 1999, pet. ref'd) (unpublished).

[3] *Ex parte Ward*, Nos. 96-624-K368A & 96-625-K368A (368th Dist. Ct., Williamson County, Tex., Mar. 9, 2001) (unpublished order).

[4] *Ward v. Cockrell*, No. A-01-CA-354-SS, at 8 (W.D.Tex. Sept. 12, 2003) (unpublished order).

The court granted relief, however, on Ward's claim that his trial counsel was ineffective at sentencing. The court identified five instances of ineffectiveness by Lowe: (1) his failure to request a curative instruction or move for a mistrial after the prosecutor queried whether the names of jurors had ever been placed on a sign in a sex offender's front yard in response to a sentence of probation; (2) his failure to make efforts to keep the portion of Ward's statement regarding unadjudicated drug offenses out of evidence; (3) his failure to object to the introduction of photographs of bestiality; (4) his failure to object to testimony regarding the absence of probationers in Williamson County granted probation by a jury after being convicted of aggravated sexual assault; and (5) his failure to object to improper jury argument by the prosecutor.[5] The court found that there was a reasonable probability that but for these errors, Ward's sentence would have been different.

Ward filed an unsuccessful motion to alter or amend the judgment. The State filed a notice of appeal from the judgment, and Ward filed a motion for COA and a notice of appeal from the order denying his motion to alter or amend. Ward's motion for COA was granted by the district court.

II

Under 28 U.S.C. § 2254, Ward is entitled to federal habeas relief only if he can demonstrate that the state court's adjudication of his ineffective assistance claims

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[5] *Id.* at 9-18.

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[6]

A state court's adjudication constitutes an "unreasonable application" when the court identifies the correct governing legal principle from Supreme Court's decisions, but applies that principle to the facts of a particular case in an objectively unreasonable way.[7]

We examine the federal habeas court's factual findings for clear error and determinations of law *de novo*.[8] An ineffective assistance of counsel claim "presents a mixed question of law and fact."[9] "When examining mixed questions of law and fact, we also utilize a *de novo* standard by independently applying the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous."[10]

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[6] 28 U.S.C. § 2254(d)(1)-(2).

[7] *See Rompilla v. Beard*, ___ U.S. ___, ___, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 519-20, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 409-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (Opinion of O'Connor, J.).

[8] *See Bosley v. Cain*, 409 F.3d 657, 662 (5th Cir.2005); *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir.2005).

[9] *Riley v. Dretke*, 362 F.3d 302, 305 (5th Cir.2004).

[10] *Ramirez*, 396 F.3d at 649.

Reviewing the state habeas court's rejection of Ward's state petition, the district court found that Ward was not entitled to relief on his ineffective assistance claim with respect to his guilty plea, but held that Ward was entitled to relief on his claim that Lowe was ineffective at sentencing. We address these issues in turn.

A

Ward contends that the district court erred when it rejected his claim that Lowe was ineffective for abandoning a meritorious motion to suppress evidence of child pornography seized after an illegal search of his computer. Ward claims that had he been properly informed of the law governing search and seizure, he would not have pled guilty and would have pressed Lowe to pursue the suppression motion.

Our review of Ward's ineffective assistance of counsel claim is governed by the familiar test of *Strickland v. Washington*: deficient performance and prejudice.[11] To prove deficient performance, "a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'"[12] We must "accord substantial deference to counsel's performance, applying the strong presumption that counsel performed adequately

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[11] 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We note that the state habeas court applied *Strickland* in assessing Ward's state habeas petition. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex.Crim.App.1999) (holding that *Strickland* applies to ineffective assistance claims raised in state habeas actions).

[12] *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052).

and exercised reasonable professional judgment."[13] To establish prejudice, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[14]

When a petitioner challenges the voluntariness of his guilty plea entered pursuant to the advice of counsel on ineffective assistance grounds, he must establish that his counsel's advice fell below the range of competence demanded of an attorney in a criminal case.[15] Further, he must show prejudice by establishing that "but for his counsel's alleged erroneous advice, he would not have pleaded guilty but would have insisted upon going to trial."[16] This assessment will turn partially on "a prediction of what the outcome of a trial might have been."[17]

Ward urges that Lowe rendered ineffective assistance by failing to adequately investigate whether the search and seizure of Ward's computer files was illegal under the Fourth Amendment and Texas law. Ward asserts that had Lowe provided minimal legal investigation, he would have discovered that all evidence yielded by the search, including

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[13] *Titsworth v. Dretke*, 401 F.3d 301, 310 (5th Cir.2005) (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

[14] *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

[15] *See Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir.1994).

[16] *Armstead*, 37 F.3d at 206; *see Carter v. Collins*, 918 F.2d 1198, 1200 (5th Cir.1990); *Uresti v. Lynaugh*, 821 F.2d 1099, 1101 (5th Cir.1987) (citing *Hill*, 474 U.S. at 58-59, 106 S.Ct. 366).

[17] *Armstead*, 37 F.3d at 206 (citing *Hill*, 474 U.S. at 56-58, 106 S.Ct. 366).

statements by the boys regarding the sexual assaults, was inadmissible. Had Lowe informed him of this, Ward claims that he would have directed Lowe to "push the suppression motion to the limit, more likely than not securing a dismissal of all charges."

We are not persuaded. The record contains no indication that Lowe failed to conduct an adequate investigation into the law and facts relevant to the suppression motion. In addition, Ward cannot establish that Lowe performed in a deficient manner by failing to seek suppression of evidence related to the sexual assault and aggravated sexual assault charges.[18] We have held that "counsel's failure to move to suppress evidence, when the evidence would have been suppressed if objected to, can constitute deficient performance."[19] Assuming *arguendo* that the search and seizure precipitated by Carta's actions was unlawful, Ward would have been unable to suppress evidence that he committed multiple sexual assaults against Grant and multiple aggravated sexual assaults

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[18] In his brief, Ward argues that successful prosecution of the suppression motion would have resulted in the dismissal of evidence supporting *all* charges against him. This argument presupposes that the suppression motion was equally meritorious with respect to evidence of child pornography, sexual assault, indecency with a child, and aggravated sexual assault.

[19] *Martin v. Maxey*, 98 F.3d 844, 848 (5th Cir.1996); *see Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (holding that when ineffectiveness claim is grounded on counsel's failure to litigate a Fourth Amendment claim, "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice").

against Clouse because this evidence was not obtained as a result of the allegedly unlawful police activity.

Ward argues that suppression of Clouse and Grant's testimony would have been appropriate under the "fruit of the poisonous tree" doctrine, which provides that "all evidence derived from the exploitation of an illegal seizure must be suppressed, unless the government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation."[20] The test for determining whether evidence is inadmissible as fruit of the poisonous tree is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[21] Evidence that would otherwise be suppressible as fruit of the poisonous tree is purged of the primary taint "if it derives from an independent source, if the link to the illegally secured evidence is attenuated, or if it would inevitably have been discovered without the aid of the illegally obtained evidence."[22]

When Ward was first arrested following the seizure of materials from his house, he was charged only with possessing child pornography. Ward did not disclose that

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[20] *United States v. Portillo-Aguirre*, 311 F.3d 647, 658 (5th Cir.2002); *see United States v. Rivas*, 157 F.3d 364, 368 (5th Cir.1998); *United States v. Caldwell*, 750 F.2d 341, 343 (5th Cir.1984); *see also Thornton v. State*, 145 S.W.3d 228, 232 (Tex.Crim.App.2004) (discussing "fruit of the poisonous tree" doctrine).

[21] *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (internal quotation marks and citation omitted).

[22] *United States v. Singh*, 261 F.3d 530, 535 (5th Cir.2001).

he had been involved in sexual relationships with minor children. Two days after the search, Adam Clouse was taken by his father, Chuck Clouse, to the Round Rock Police Station where he disclosed that he had been sexually abused by Ward. An arrest warrant was prepared and Ward was re-arrested and charged with aggravated sexual assault. Importantly, there is no indication that Clouse's revelation was the product of police exploitation of evidence seized from Ward's house.

Even assuming that Clouse's disclosure was linked to the search and seizure, the link was sufficiently attenuated to dissipate any taint. Clouse's decision to come forward, while possibly attributable to Ward's arrest in a tangential way,[23] was the product of his own free will.[24] Although only two days elapsed between the search and seizure and Clouse's disclosure, the record indicates that

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[23] Presumably, the disclosure constitutes a "fruit" of the search because Ward's arrest emboldened Clouse to come forward when he otherwise would not have done so. This hypothesis is speculative in nature, and lacks a solid factual basis in the record. Nonetheless, it is the only plausible link between the search and the discovery of the sexual abuse committed by Ward.

[24] The Supreme Court has observed:

> Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence.

United States v. Ceccolini, 435 U.S. 268, 276-77, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); *see United States v. Butts*, 729 F.2d 1514, 1528 (5th Cir.1984) (among the factors considered in making the attenuation determination is "whether the testimony was the act of the witness's own free will").

his decision to report Ward was in no way "coerced or even induced by official authority."[25] As a result, suppression of his testimony would have been inappropriate even if Ward's motion had been pursued by Lowe and a successful outcome achieved.

Likewise, suppression of Grant's testimony would have been improper because Grant also chose to voluntarily report that he had been sexually abused by Ward. At trial, Grant testified that he initially denied having been abused after news of Ward's arrest first came out. Grant testified that he eventually decided to go to the police with his story after he admitted to Chuck Clouse that he had been abused. As with Adam Clouse, there is no evidence that Grant's decision to report Ward's illegal behavior was the result of police exploitation of evidence seized from Ward's house.

Given that Lowe's failure to challenge the admissibility of Clouse and Grant's testimony was not objectively unreasonable, Ward cannot establish that his guilty plea was entered involuntarily as a result of his counsel's ineffective assistance. Even if Lowe had succeeded in suppressing evidence of child pornography taken from Ward's computer, Ward still would have faced two separate indictments charging, *inter alia*, multiple counts of sexual assault and aggravated sexual assault. In his affidavit, Lowe stated that one of his overriding strategic goals was

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[25] *Ceccolini*, 435 U.S. at 279, 98 S.Ct. 1054. In his trial testimony, Clouse stated that he had been "tricked" by Detective LeMay into disclosing that he had been sexually abused when LeMay stated that Ward had already confessed to the abuse. This testimony suggests at most that LeMay may have employed deception in order to encourage Clouse to speak openly once he came forward.

that of limiting Ward's exposure to "multiple trials and stacked sentences." The prosecutor agreed to consolidate the cases if Ward would plead guilty and confess. This same pressure to plead guilty would have been present had evidence of child pornography been excised from the case. Ward has offered no argument or evidence as to any countervailing considerations which would have altered his decision to plead guilty upon suppression of the child pornography alone. Accordingly, we agree fully with the district court that Ward has failed to demonstrate that his guilty plea was involuntary.

B

We now turn to the State's argument that the district court erred in holding that Ward was prejudiced by his counsel's ineffective assistance at sentencing. As before, our analysis is guided by the performance and prejudice test of *Strickland*.

1

The district court identified five separate instances of defective assistance rendered by Lowe at sentencing, all of which are contested by the State. We will take up each instance in turn.

a

The State first argues that the district court erred in holding that Lowe acted in an objectively unreasonable manner when he failed to request a curative instruction

and seek a mistrial after the prosecutor made what the court described as "threats to the jury."[26]

When being questioned by Lowe about various conditions that may be placed on sex offenders who are given probation, Dr. Cole opined that "[t]here have been several . . . cases around the State where Judges will require a notice on [the sex offender's] door or a sign in the yard, something of that nature, again to warn the community." During cross-examination, the prosecutor asked Dr. Cole if he had "ever had a Judge that would require not only the sign be put out there but the names and addresses and phone numbers of the jury members that gave him probation" be placed on the sign. Before Dr. Cole could respond, Lowe interposed an objection, and the court asked the prosecutor to restate the question. The prosecutor then inquired whether, in cases where juries had recommended probation for sex offenders and probation was given, the judge had ordered that the "names of the jurors and their addresses and telephone numbers" be listed on the sign. Lowe again objected and his objection was sustained. Lowe did not request a curative instruction or seek a mistrial.

During a subsequent recess, Lowe informed the court that he was having "more and more trouble about the juror's names on the signs," and requested a curative instruction. He also announced his intention to seek a mistrial if the request was granted. The court denied the request as untimely, and stated, "I certainly would have [issued an instruction], given the opportunity to at the time that the objection was made; but there's been an awful lot of testimony since then."

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[26] *Ward v. Cockrell*, No. A-01-CA-354-SS, at 9.

In his affidavit, Lowe explained that he did not seek a curative instruction because doing so "would only remind the jury of the question," and he "did not believe that an instruction to disregard would be any more effective than the trial court's decision to sustain" his objection. Further, he stated that he did not seek a mistrial because he believed that Ward "had received a fair trial and would not get any better opportunity to present his case." Lowe claimed that a mistrial would have allowed the prosecutor time to better prepare for Dr. Cole's testimony and to hire a rebuttal expert. In addition, Lowe feared that a mistrial would have resulted in the loss of favorable testimony from Patti Love and Shannon Grant, both of whom were viewing Ward in an increasingly negative light.

In reviewing Ward's habeas application, the state habeas court found that Lowe's failure to request a curative instruction was part of a "deliberately formed strategy to avoid bringing the question again to the attention of the jury."[27] The court then rejected Ward's ineffective assistance challenge, noting that it was "based almost entirely on the premise of using a different trial strategy designed to object to everything and challenge the State's evidence."[28] "Such hindsight," the court concluded, "is not permitted in evaluating a claim of ineffective assistance of counsel."[29]

We have observed that a "conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless

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[27] *Ex parte Ward*, Nos. 96-624-K368A & 96-625-K368A, at 8.

[28] *Id.*

[29] *Id.*

it is so ill chosen that it permeates the entire trial with obvious unfairness."[30] Under this indulgent standard, we cannot say that Lowe's strategic decision to avoid seeking a mistrial was constitutionally deficient. In deciding whether to seek a mistrial, Lowe was required to balance the harm caused by the prosecutor's improper question against the legitimate possibility that a new trial would present less propitious prospects for his client. Lowe opted to cast his lot with a jury that, although possibly feeling threatened, had heard favorable testimony from Love and Grant, rather than risk retrying the case with Love and Grant appearing as hostile witnesses. This decision, while debatable, was not objectively unreasonable.

Lowe's failure to seek a curative instruction after his objection was sustained, however, cannot be considered an objectively reasonable tactical decision based on an informed trial strategy. After hearing the prosecutor ask two consecutive questions suggesting that their names, addresses and telephone numbers could be placed on a sign in Ward's front yard if they sentenced him to probation, the jury would have been understandably anxious to learn the answer. What they received following Lowe's objections was silence. It was incumbent upon Lowe, whose trial strategy was directed toward securing a sentence of

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[30] *Martinez v. Dretke*, 404 F.3d 878, 885 (5th Cir.2005) (internal quotation marks and citations omitted); *see United States v. Jones*, 287 F.3d 325, 331 (5th Cir.2002) (" 'Informed strategic decisions of counsel are given a heavy measure of deference and should not be second guessed.' ") (quoting *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir.1999); *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir.1993) ("Given the almost infinite variety of possible trial techniques and tactics available to counsel, this Circuit is careful not to second guess legitimate strategic choices.")).

probation for Ward, to take some action to dispel the notion that the court would, in effect, sentence the jury to public shame, ridicule and disapprobation if it provided Ward with his desired outcome. Securing an instruction to disregard, while not fully mitigating the effect of the prosecutor's thinly veiled threat, would have provided the jury with a solid basis for proceeding without fear of state-imposed repercussions. The state habeas court's decision to the contrary was an objectively unreasonable application of the law to the facts.

b

The State also challenges the district court's conclusion that Lowe offered ineffective assistance when he allowed evidence of Ward's unadjudicated drug offenses to reach the jury. Before trial, Lowe requested that Ward prepare a written autobiography of his life up to the point of his arrest and incarceration. Ward prepared a detailed statement nearly forty pages in length in which he recounted, *inter alia*, his involvement with illegal drugs, including cocaine, marijuana, and methamphetamine, roughly ten years before his arrest.

Upon receipt of this written statement, Lowe decided that it should be used by Dr. Cole and be heard by the jury. Lowe disclosed the statement to Dr. Cole, and did not seek to invoke attorney client or work product privilege when the report was subpoenaed. At trial, the prosecutor offered Ward's statement into evidence without objection from Lowe. Lowe referenced the statement when he announced his strategy to the jury, stating:

> You will hear also from Ben Ward himself. Ben is here asking you for consideration, and in return

> for that he's bringing you complete honesty. He has written a report for Dr. Cole – it's in evidence[] – where he confesses to every sin he's ever committed. He's here to answer any questions the State might have and to give you whatever information that you might need.

Ward's involvement with illegal drugs was subsequently referenced numerous times during the course of the trial, including his admission to having been both a user and a dealer.

Lowe defended his decision to disclose the statement and not seek exclusion of Ward's prior uncharged drug offenses on grounds that a posture of complete openness would bolster the credibility of Dr. Cole and convince the jury that Ward was "ready for treatment." He asserted that Ward understood and agreed with this strategy. The state habeas court found this strategy reasonable, noting that Lowe made frequent use of Ward's statement, including references to his prior involvement with drugs, to demonstrate that he was "good candidate for treatment and rehabilitation."[31]

While we do not quarrel with Lowe's strategic decision to be open and honest with the jury, we conclude that Lowe provided ineffective assistance in allowing the jury unabated access to information about drug offenses remote from and unrelated to the crimes for which Ward was indicted. Lowe's strategy of openness called for Ward to acknowledge his guilt and take responsibility for his past failings in such a way that the jury would be convinced that he was a good candidate for rehabilitation, thereby

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[31] *Ex parte Ward*, Nos. 96-624-K368A & 96-625-K368A, at 6-7.

increasing his chances for probation. This goal could have been accomplished by having Ward testify openly about his sexual crimes without placing before the jury evidence of past drug involvement that had no relevance to the charged offenses.

We also find unpersuasive the State's argument that any objection by Lowe to the admission of evidence regarding Ward's involvement with drugs would have been futile. Texas law provides that at the punishment stage of a criminal trial

> evidence may be offered by the state and the defendant as to any matter the court deems *relevant to sentencing*, including but not limited to . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.[32]

The Texas Court of Criminal Appeals has held that relevancy determinations at sentencing should be based on an analysis of "what is helpful to the jury in determining the appropriate sentence in a particular case."[33] The Court

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[32] Tex.Crim. Proc.Code Ann. art. 37.07, § 3(a)(1) (Vernon Supp.1997) (emphasis added).

[33] *Rogers v. State*, 991 S.W.2d 263, 265 (Tex.Crim.App.1999). In making this determination, the Court has held that, while not a "perfect fit," Texas Rule of Evidence 401 is "helpful" in determining whether evidence is admissible at sentencing. *See Mendiola v. State*, 21 S.W.3d 282, 285 (Tex.Crim.App.2000) (citing *Rogers*, 991 S.W.2d at 265). Rule 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to

(Continued on following page)

has explained that these determinations are "a function of policy rather than a question of logical relevance."[34] Pertinent policy considerations include "giving complete information for the jury to tailor an appropriate sentence for a defendant; the policy of optional completeness; and admitting the truth in sentencing."[35] Even if a fact is found to be relevant to the determination of a defendant's sentence, it may still be excluded on grounds that "its probative value is substantially outweighed by the danger of unfair prejudice."[36]

Here, evidence that Ward had used and sold illegal drugs roughly ten years before his arrest for sex crimes was not relevant to the jury's sentencing determination. At no point was Ward charged with any drug crimes,[37] and no suggestion was raised at trial that Ward's sexual misconduct was related to his past drug abuse. Ward's involvement

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the determination of the action more probable or less probable than it would be without the evidence." Tex.R. Evid. 401.

[34] *Sunbury v. State*, 88 S.W.3d 229, 233 (Tex.Crim.App.2002).

[35] *Id.* at 233-34.

[36] Tex.R. Evid. 403; *see Rogers*, 991 S.W.2d at 266 (applying Rule 403 in sentencing context); *Rodriguez v. State*, 163 S.W.3d 115, 119 (Tex.App. – San Antonio, pet. filed June 8, 2005) ("[A]dmissibility of punishment phase evidence that the trial court deems relevant is still subject to a rule 403 analysis." (citing *Rogers*, 991 S.W.2d at 266-67)); *Fowler v. State*, 126 S.W.3d 307, 311 (Tex.App. – Beaumont 2004, no pet.) (applying rule 403 sentencing context); *Contreras v. State*, 59 S.W.3d 362, 365 (Tex.App. – Houston [1st Dist.] 2001, no pet.) (same).

[37] Texas courts have held that evidence of prior sentences imposed for past convictions is relevant to sentencing because such evidence informs the jury as to the type of sentences that have proved insufficient in deterring individual defendants from committing future crimes. *See Sunbury*, 88 S.W.3d at 235; *Rogers*, 991 S.W.2d at 266. These cases are distinguishable given that Ward was never charged for his prior involvement with drugs.

with illegal drugs was separate and unrelated to his sex crimes, and was therefore not helpful to the jury in making its sentencing determination.

In addition, admission of evidence regarding Ward's involvement with drugs was improper because any probative value it may have had with respect to determining the appropriate length of Ward's sentence was far outweighed by the danger that it would give rise to unfair prejudice. Texas courts have held that "unfair prejudice" refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[38] The admission of evidence establishing that Ward had used and sold illegal drugs roughly a decade before committing aggravated sexual assault gave rise to a risk that the jury would attempt to punish Ward for both his drug offenses and his sex crimes when determining his sentence. The probability that such evidence would have been excluded is high.

The State's argument that evidence of Ward's involvement with drugs would have been necessarily admissible as part of the factual basis for Dr. Cole's expert testimony is also misplaced. Under Texas law, a testifying expert may be "required to disclose on cross-examination" the facts or data underlying her opinion.[39] However, expert "testimony may be admissible while at the same time the underlying facts or data [supporting her opinion] are

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[38] *Cohn v. State*, 849 S.W.2d 817, 820 (Tex.Crim.App.1993) (internal quotation marks and citation omitted); *see Erazo v. State*, 144 S.W.3d 487, 501-02 (Tex.Crim.App.2004); *Newbury v. State*, 135 S.W.3d 22, 43 (Tex.Crim.App.2004).

[39] Tex.R. Evid. 705(a).

inadmissible."[40] When the facts or data underlying an expert's opinion are otherwise inadmissible, "the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial."[41] Because evidence of Ward's involvement with drugs was inadmissible, there is a good possibility that an objection by Lowe would have been sustained even though it constituted "facts or data" underlying Dr. Cole's expert opinion testimony.[42] Because the evidence related to past criminal conduct for which Ward was never charged, the jury could easily have considered it not for the purpose of ascertaining Ward's propensity for rehabilitation, but rather as an additional basis for assessing a lengthy prison sentence.

In short, we find that the district court did not err in holding that Lowe rendered ineffective assistance by allowing without objection the presentation of evidence relating to Ward's past involvement with drugs.

c

The State next argues that the district court erred in holding that Lowe performed in a deficient manner by

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[40] *Boswell v. Brazos Elec. Power Coop., Inc.*, 910 S.W.2d 593, 602 (Tex.App. – Fort Worth 1995, writ denied).

[41] Tex.R. Evid. 705(d).

[42] *See Resendez v. State*, 112 S.W.3d 541, 544-45 (Tex.Crim.App.2003) (holding that a trial judge did not abuse his discretion when he excluded photographs under Rule 705(d) because they were inadmissible under Rule 403 and were likely to be used for purposes other than supporting the expert's opinion).

failing to object to the admission of images of bestiality seized from Ward's computer. In his affidavit, Lowe stated that he did not object to admission of these grotesque images because he believed them to be admissible "for impeachment of our strategy of openness" as well as constituting background for Dr. Cole's testimony. The state habeas court did not directly address the admission of this evidence.

We can identify no objectively reasonable basis in this case for permitting the sentencing jury to view the images of adult bestiality. The images did not form part of the factual basis for the charges to which Ward plead guilty, and had no relevance to the jury's sentencing determination apart from demonstrating the depths of depravity to which Ward had sunk. Even if the evidence were relevant in some tangential way to the determination of Ward's sentence, we believe it highly probable that considerations of unfair prejudice would have sufficed to keep this evidence from the jury.[43]

Further, we reject the State's argument that Ward "opened the door" to the bestiality images by purporting to be open and honest with the jury.[44] However, to the extent that Ward may have opened the door, the trial court would have been within its discretion to exclude the images as

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[43] *See United States v. Harvey*, 991 F.2d 981, 995-96 (2d Cir.1993) (mere description of "X-rated" videos in defendant's possession containing images of "gross acts involving human waste, and people engaging in bestiality and sadomasochism" was "so prejudicial that it denied [defendant] his right to a fair trial").

[44] *See Perry v. State*, 158 S.W.3d 438, 442 (Tex.Crim.App.2004) (defendant may open the door to otherwise inadmissible impeachment evidence); *Theus v. State*, 845 S.W.2d 874, 878 (Tex.Crim.App.1992) (same).

unfairly prejudicial.[45] The district court did not err in holding that Lowe was ineffective for failing to object to this evidence.

d

The State next contests the district court's holding that Lowe was ineffective for failing to object to testimony by the assistant director for the Williamson County probation department that of the 4,100 probationers in Williamson County, not one was "currently being supervised on probation for aggravated sexual assault that was granted by a jury."[46] Lowe defended his decision not to object on grounds that he "did not want to give the jury any impression that Mr. Ward was trying to hide anything." In its findings of fact, the state habeas court found that Lowe chose not object to the question based on his "deliberately formed . . . strategy of giving the appearance to the jury that [Ward] was being completely open."[47]

On appeal, the State argues that Lowe "could reasonably have withheld objecting to minimize the importance of the testimony." We find this argument, as well as the state habeas court's reasoning, unpersuasive and an unreasonable application of *Strickland*. Beyond being irrelevant to the proper determination of Lowe's sentence,

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[45] *See Martinez v. State*, 17 S.W.3d 677, 687 (Tex.Crim.App.2000) (trial court is within its discretion to exclude evidence under Rule 403 when defendant has otherwise opened the door to its admission).

[46] The record reveals that on redirect examination, the prosecutor elicited identical testimony from the same witness. Lowe objected on grounds that the question had been "asked and answered." The objection was overruled.

[47] *Ex parte Ward*, Nos. 96-624-K368A & 96-625-K368A, at 8.

this testimony was prejudicial to Ward in that it invited the jury to base its sentencing decision on an improper basis.[48] Permitting the State to present this evidence without objection was unreasonable, and cannot be recast as a "strategic decision" given that the evidence was wholly unrelated to Ward's background or his readiness for treatment. In its brief, the State acknowledges this reality by conceding that Lowe's "decision not to object may, in hindsight, have been deficient." We find no error in the district court's holding on this point.

e

In its final challenge, the State argues that the district court erred when it held that Lowe was ineffective for failing to object to several statements made by the prosecutor during closing argument, including a recitation from the Bible and a comparison of Williamson County attitudes toward crime to those in Galveston and the Rio Grande Valley. Discussing Ward's alleged turn to religion, the prosecutor observed:

> We heard some talk from [Ward's] mom . . . that Ben had asked for forgiveness, had gone to confession, that sort of thing. . . . As I remember it, and I don't have the actual chapter and verse . . . [b]ut as I remember it, when Christ was crucified there were two thieves on each side of Christ, and they asked forgiveness. They asked what they should do, and he told them how that they

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[48] *Cf. Borjan v. State*, 787 S.W.2d 53, 56 (Tex.Crim.App.1990) ("The State may not . . . argue that the community or any particular segment of the community expects or demands either a guilty verdict or a particular punishment.").

> could get forgiveness. They did that . . . and Christ said, "You're forgiven." And I think that Ben Ward can and probably has been forgiven. But Christ didn't take the thief off the tree. Christ let the thief pay for the crime that he committed, and I think that's important.

The prosecutor then observed that "Christ thought children were really something else," and quoted the following passage from the book of Matthew: "But whosoever [sic] shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck and that he were drowned in the depth of the sea."[49]

The prosecutor also recounted Dr. Cole's response to a question regarding the percentage of sex offenders in Galveston County that receive probation:

> [H]e got to throwing around, "It's pretty big, maybe a third." I bet my paycheck it wasn't [a] third. And if it is, then maybe that's what's wrong with Galveston County because there's a lot of Galveston County that's not that beach, folks, that we see. You go down there and look at the ghettos and the problems that they have in Galveston County proper and in Galveston itself. Get off that beach and get into their town, and you'll realize that it isn't Williamson County. Maybe that's what the deal is. Maybe their juries do give probation. But I've got news for you. It's not the type of thing that ought to be happening in Williamson County.

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[49] *See Matthew* 18:6 (New King James).

Turning to Ward's involvement with drugs, the prosecutor noted:

> And then he gets into a situation where he begins to use marijuana and used it heavily daily and then begins to sell marijuana. And yes, we have lawyers coming up here all the time from the valley saying what are you people doing trying to send these people to the pen for just a few pounds of marijuana, because they think that's chicken feed, you know? Well, we don't. We think in our county if you want to sell a few pounds of marijuana, you get to go to the pen. Is that something bad? Do ya'll like living where you're living? Do ya'll want to live in the valley-type situation where several hundred pounds of marijuana may be an offense? Or do you like living where you are and raising your kids where you are because of the fact that the law enforcement and the good people of this community tow [sic] the line and expect others to tow [sic] the line?

In his affidavit, Lowe justified his failure to object to the prosecutor's reference to religion on grounds that it was invited by testimony about Ward's return to faith. Further, Lowe claimed that he opted not to object to the prosecutor's reference to drug offense sentences in the Valley because it was "a fair comment on our arguments that Mr. Ward should get probation." The state habeas court accepted this explanation, noting: "In deciding not to object to the prosecutor's final arguments, Lowe formed the opinion that the arguments were not objectionable or not harmful enough to draw the jury's attention with an

objection. He deliberately made a strategic decision not to object."[50]

We conclude that the state habeas court unreasonably applied *Strickland* with respect to Ward's claim that Lowe should have challenged the prosecutor's recitation of the millstone passage. Texas law provides that "proper jury argument must fall within one of the following categories: (1) summary of the evidence; (2) reasonable deduction from the evidence; (3) in response to argument of opposing counsel; and (4) plea for law enforcement."[51] Under this standard, the prosecutor's reference to the "millstone passage" was improper because it reached beyond the record evidence and encouraged the jury to base its sentencing determination on notions of divine retribution. The State posits that this argument was made in response to testimony by Ward's mother that, following his arrest, Ward had turned back to his Catholic faith, attended confession, and sought absolution for his sins. The context of this testimony reveals that it was aimed at bolstering Ward's claim that he was penitent and ready for treatment. Importantly, Ward did not seek to persuade the jury that his spiritual contrition necessarily required temporal absolution. Argument that Ward was not ready for treatment, or perhaps that his spiritual reawakening was opportunistic, would have been the proper rejoinders. However, suggesting that Ward's embrace of faith dictated that he be judged by Biblical standards of justice was

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[50] *Ex parte Ward*, Nos. 96-624-K368A & 96-625-K368A, at 8.

[51] *Borjan v. State*, 787 S.W.2d at 55 (citing *Modden v. State*, 721 S.W.2d 859, 862 (Tex.Crim.App.1986); *Alejandro v. State*, 493 S.W.2d 230 (Tex.Crim.App.1973)).

improper, and an objection to this suggestion was necessary in order to mitigate its highly prejudicial effect.[52]

On the other hand, we conclude that Lowe was not ineffective for failing to object to the prosecutor's comparison of the attitude toward crime in Galveston and the Rio Grande Valley to that in Williamson County. Ward asserts that this argument was an improper appeal to the jury to sentence him based on community expectations, while the State contends that it was a proper plea for law enforcement. Argument by counsel "constitutes a proper plea for law enforcement if it urges the jury to be the voice of the community, rather than asking the jury to lend its ear to the community."[53] While the prosecutor's comments danced close, they did not constitute an impermissible invitation for the jury to sentence Ward based on community expectations. The prosecutor did not state that the people of Williamson County were expecting or demanding a particular

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[52] *See Oakley v. State*, 125 Tex.Crim. 258, 68 S.W.2d 204, 207 (1934) (noting that prosecutor' s citation of the millstone passage and associated religious argument "was a direct appeal to religious prejudice and calculated to arouse the emotions" of the jury); *Commonwealth v. Brown*, 551 Pa. 465, 711 A.2d 444, 458 (1998) (prosecutor's invocation of millstone passage held to be reversible error); *Long v. State*, 883 P.2d 167, 177 (Okla.Crim.App.1994) (prosecutor's quotation of the millstone passage at penalty phase was "rank misconduct"); *cf. Arnett v. Jackson*, 393 F.3d 681, 691 (6th Cir.2005) (noting in response to judge's invocation of the millstone passage that "[i]f the Constitution sanctions such direct reliance on religious sources when imposing criminal sentences, then there is nothing to stop prosecutors and criminal defense lawyers from regularly citing religious sources like the Bible, the Talmud, or the Koran to justify their respective positions on punishment").

[53] *Harris v. State*, 122 S.W.3d 871, 888 (Tex.App. – Fort Worth 2003, pet. ref'd) (citing *Cortez v. State*, 683 S.W.2d 419, 421 (Tex.Crim.App.1984)).

sentence;[54] rather, the prosecutor sought to goad the jury to return a lengthier sentence by parading before it the specter of living in a permissive and crime-infested locale. As an objection to this likely would have been futile, we cannot say that Lowe was ineffective for failing to lodge one.

In sum, we conclude that Lowe was ineffective for failing to object to the prosecutor's quotation of the mill-stone passage during closing argument; but was not ineffective for failing to object to discussion of the varying attitudes toward crime in different Texas counties.

2

Having found that Lowe performed deficiently at the punishment phase of Ward's trial, we must now determine whether Ward suffered prejudice as a result. In order to prove prejudice, Ward must establish a reasonable probability that but-for his counsel's deficient performance, he would have received a "*significantly* less harsh" sentence.[55]

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[54] *See, e.g., Cortez*, 683 S.W.2d at 420; *Prado v. State*, 626 S.W.2d 775, (Tex.Crim.App.1982); *Pennington v. State*, 171 Tex.Crim. 130, 345 S.W.2d 527, 528 (1961); *Cox v. State*, 157 Tex.Crim. 134, 247 S.W.2d 262, 263 (1961); *Porter v. State*, 154 Tex.Crim. 252, 226 S.W.2d 435, 436 (1950); *Peysen v. State*, 136 Tex.Crim. 127, 124 S.W.2d 137, 138 (1939); *Mata v. State*, 952 S.W.2d 30, 33 (Tex.App. – San Antonio 1997, no pet.).

[55] *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir.1993). Ward contends that *Spriggs* was overruled by the Supreme Court's decision in *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). We have adopted *Glover*'s "any amount of jail time" test for cases involving the federal sentencing guidelines, while holding that *Spriggs* still applies in cases involving state sentencing regimes. *United States v. Grammas*, 376 F.3d 433, 437-38, 438 n. 4 (5th Cir.2004). We may not overrule another panel of this Court absent an intervening decision by the United States Supreme Court overriding the earlier decision.

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We have observed that this standard reflects our concern of allowing review of sentences imposed by state courts possessing a "wide range of sentencing discretion" while avoiding an "automatic rule of reversal."[56] When applying this standard, we "must consider such factors as the defendant's actual sentence, the potential minimum and maximum sentences that could have been received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances."[57]

The State argues that Ward cannot establish a reasonable probability that his sentence would have been significantly less harsh but for Lowe's errors. The State observes that Ward's sixty-year sentence fell far short of the maximum of life, indicating that the jury afforded him some measure of clemency despite Lowe's ineffective assistance. Further, the State urges that the despicable nature of Ward's crimes coupled with the well-known abhorrence expressed by Williamson County juries towards sex offenders guaranteed a lengthy sentence regardless of whether Lowe performed deficiently. In short, the State argues that Ward must regard his sentence of sixty years as a "victory"; that no amount of improvement in Lowe's performance would have resulted in more lenient punishment.

United States v. Pettigrew, 77 F.3d 1500, 1511 n. 1 (5th Cir.1996). Thus, *Spriggs* applies here.

[56] *United States v. Reinhart*, 357 F.3d 521, 531 (5th Cir.2004) (internal quotation marks and citation omitted); *see United States v. Phillips*, 210 F.3d 345, 351 (5th Cir.2000).

[57] *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir.1994) (citing *Spriggs*, 993 F.2d at 88).

On the other hand, Ward argues that the cumulative prejudicial effect of his counsel's errors gives rise to a reasonable probability that, but-for those errors, he would have received a significantly shorter sentence. This argument is not without merit. Timely objections likely would have resulted in the exclusion of the bestiality photographs and evidence of Ward's involvement with drugs, preventing the jury from considering this highly prejudicial material when determining Ward's sentence. Further, a timely objection and request for a curative instruction in response to testimony regarding the lack of persons convicted of aggravated sexual assault given probation in Williamson County would have aided in mitigating any suggestion that Ward's sentence should mirror those assessed by other Williamson County juries.

In addition, a timely objection and request for a curative instruction would have mitigated the prejudice generated by the prosecutor's invocation of the millstone passage, a statement calculated to incite the jury to factor into its sentencing determination considerations of divine retribution. Finally, the failure to request a curative instruction in response to the prosecutor's suggestion that the jurors' names, addresses and telephone numbers could be placed on a sign in Ward's front yard if they had the temerity to grant probation was inexcusable. Any rational juror faced with such a prospect would be hesitant to consider a sentence of probation for fear of suffering ostracization within her community.

Considering this evidence in the first instance, we may be persuaded that but-for these errors, Ward would have received a significantly less harsh sentence. Our task under the AEDPA, however, is that of determining whether the state habeas court's application of the law to

the facts was reasonable. Importantly, in order to grant habeas relief from a state conviction following rejection of the petitioner's state habeas application, we must conclude that the state habeas court's application of federal law was not only incorrect, but "objectively unreasonable."[58]

With respect to prejudice, the state habeas court held that "given the severity and number of the offenses and the strength of the evidence [against Ward], there is no reasonable probability that the outcome would have been different."[59] While we may take issue with the *correctness* of this determination, we cannot say that it constitutes an objectively unreasonable application of federal law to the facts of this case. Insulated from all potentially inadmissible evidence and prejudicial statements, the jury would still have heard testimony that Ward took impressionable boys into his confidence – showering them with attention, gifts, and encouragement – only to commit inexcusable depredations, including sexual assault and aggravated sexual assault. Our society does not deal lightly with these sorts of sexual predators; nonetheless, the jury in this case sentenced Ward to 60 years when a sentence of 99 years or life was available.[60] Given the seriousness of the offenses

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[58] *See, e.g., Garcia v. Dretke*, 388 F.3d 496, 500 (5th Cir.2004); *Jones v. Dretke*, 375 F.3d 352, 354 (5th Cir.2004); *Morrow v. Dretke*, 367 F.3d 309, 313 (5th Cir.2004); *Riley v. Dretke*, 362 F.3d 302, 305 (5th Cir.2004); *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir.2003).

[59] *Ex parte Ward*, Nos. 96-624-K368A & 96-625-K368A, at 9.

[60] *See* Tex. Pen.Code Ann. § 22.021(e) (Vernon 1994) (aggravated sexual assault described as a first degree felony); Tex. Pen.Code Ann. § 12.32(a) (Vernon 1994) ("An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term or not more than 99 years or less than 5 years.").

to which Ward pleaded guilty, a reasonable possibility exists that he may receive a *more harsh* sentence if he were granted a new trial as to punishment.[61] In short, looking as we must through the prism of AEDPA deference, we decline to disturb the state habeas court's determination that Ward was not prejudiced.

III

Because Ward failed to establish that his guilty plea was entered involuntarily, we find no error in the district court's rejection of his ineffective assistance claim with respect to his conviction. This portion of the district court's judgment is AFFIRMED. However, because we are persuaded that the state habeas court's determination that Ward suffered no prejudice as a result of his counsel's errors does not constitute an objectively unreasonable application of clearly established federal law to the facts of this case, we REVERSE the judgment of the district court granting Ward habeas relief as to his sentence, and RENDER judgment in favor of the state.

AFFIRMED in part, REVERSED in part, and judgment RENDERED for the state.

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[61] The district court recognized this fact, warning Ward "with the old adage, 'be careful what you wish for – you might get it.'" *Ward v. Cockrell*, No. A-01-CA-354-SS, at 19 n. 3.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

BERNARD JAMES WARD,

Petitioner,

-vs- Case No. A-01-CA-354-SS

JANIE COCKRELL,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

ORDER

(Filed Sep. 15, 2003)

Before the Court are petitioner Bernard James Ward's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 filed in Cause No. A-01-CA-354-SS [#1], respondent's answer thereto [#13 and petitioner's reply [#14]. All matters in this case were referred to the Honorable Stephen H. Capelle, United States Magistrate Judge, for resolution or report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges, as amended, effective January 1, 1994. On March 11, 2003, the Magistrate Judge issued a report and recommendation [#15] that the petition for habeas corpus be denied. On April 10, 2003, after receiving an extension of time, Ward filed written objections to the report and recommendation [#18].

After granting two motions for continuance by the respondent, the Court held oral arguments in this case on August 13; 2003, and the parties appeared through counsel of record. Having conducted a *de novo* review of the file, the Court has determined the Magistrate Judge's report and recommendation should be rejected in part and Ward's application for writ of habeas corpus challenging his sentence should be granted.

Background

Bernard James Ward was charged by the State of Texas in the 368th Judicial District Court of Williamson County, Texas in cause numbers 96-624-K368 and 96-625-K368, styled *State of Texas v. Bernard James Ward,* with one count of indecency with a child, three counts of sexual assault three counts of aggravated sexual assault, and possession of child pornography. Ward, represented by criminal defense attorney Hugh Lowe, pleaded guilty to all charges. A jury sentenced Ward to sixty years confinement and a $5000 fine for each count of aggravated sexual assault, twenty years confinement and a $2000 court [sic] for indecency with a child, and ten years confinement and a $1000 fine for possession of child pornography, all sentences to run concurrently. *See* Pet. Ex. 1 (Jury Verdict).

Ward appealed his convictions to the Texas Court of Appeals in Austin. *Ward v. State,* Nos. 03-97-00567-CR and 03-97-00568-CR (Tex. App. – Austin Mar. 11, 1999, pet. ref'd); *see* Pet. Ex. 2 (appellate court opinion). After the appellate court affirmed his convictions and the Court of Criminal Appeals refused his petition for discretionary review, Ward filed a state application for habeas relief. *Ex*

Parte Ward, Nos. 96-624-K368 & 96-625-K368; *see* Pet. Ex. 7 (state trial court habeas order). On May 31, 2001, the Texas Court of Criminal Appeals denied Ward's application without written order based on the findings of the trial court. *Ex Parte Ward,* App. Nos. 798-01; *see* Pet. Ex. 8 (Court of Criminal Appeals postcard). Ward timely filed his federal habeas corpus application on June 4, 2001, asserting in fifteen specific claims three general categories of grounds for relief: (1) prosecutorial misconduct; (2) trial court errors that resulted in a violation of his due process rights; and (3) ineffective assistance of trial counsel. Because Ward previously raised these grounds for collateral relief in state court, he exhausted his state court remedies as required by 28 U.S.C. § 2254.

AEDPA Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a state prisoner's federal habeas petition as to any claim addressed by the state courts on the merits only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Brown v. Cain,* 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied,* 520 U.S. 1195 (1997). To rebut the presumption of correctness of state courts' factual determinations, a petitioner must provide clear and convincing evidence that the factual determination was unreasonable. *See* 28 U.S.C. § 2254(e)(1).

Ward objects to the Magistrate's deference to the state court. Ward contends the state habeas failed to afford him a full and fair hearing and therefore this Court should have reviewed his claims *de novo*. Ward points out the Court of Criminal Appeals made no specific factual findings and included no analysis in its postcard denying habeas relief and so there is essentially nothing to which the federal courts can defer. *See* Objs. at 4; Pet. Ex. 8. The Court of Criminal Appeals based its conclusion on the findings of the state trial court, which denied his application for habeas relief based on the trial records and affidavit of Lowe without conducting a hearing. *See* Pet. Ex. 7. While Ward's argument that the state court findings should not be afforded deference when the Court of Criminal Appeals makes no specific findings comports with common sense, it is contrary to the established law of this Circuit.

In the Fifth Circuit, a federal habeas court is required to defer to the state court's findings even where the state trial court held no hearing, made no factual findings, failed to state the legal basis of its decision, and simply used a form order to transmit the writ to the Court of Criminal Appeals. For instance in *Jackson v. Johnson*, 150 F.3d 520 (5th Cir. 1998), an ineffective assistance of counsel case in which the state habeas court held no evidentiary hearing and entered a summary order finding effective assistance solely on the basis the trial attorney's self-serving affidavit, the Fifth Circuit held because "the state court did rule against [the habeas petitioner] on the merits of his ineffective assistance of counsel claim . . . that ruling deserves the deference afforded state courts under the new AEDPA writ procedures." Since *Jackson*, the Circuit has reemphasized AEDPA "compels federal

courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (en banc), *cert. denied, Neal v. Epps,* 537 U.S. 1104 (2003) (holding the Court is to review only the decision of the state court, not its reasoning, in determining whether it is contrary to or involved in a misapplication of clearly established federal law). In this case, the state trial court did make findings (Pet. Ex. 7) and the Court of Criminal Appeals indicated it adopted those findings (Pet. Ex. 8). Accordingly, Ward is only entitled to relief if he can show the state trial court's determination that he is not entitled to habeas relief is contrary to clearly established law.

Analysis

Ward argues he is entitled to habeas relief because of misconduct on the part of the prosecutor during the sentencing trial, the trial court's errors that resulted in a violation of his due process rights, and because his trial counsel provided constitutionally ineffective assistance. The state habeas courts addressed each of these claims and concluded Ward was not entitled to habeas relief.

I. Prosecutorial Misconduct

In his petition, Ward identifies many troubling actions on the part of the prosecutor during the punishment phase of his trial including: (1) suggesting the juror's names would appear on a sign in Ward's front yard if they recommended probation; (2) introducing the irrelevant and prejudicial testimony that Williamson County juries never grant probation in aggravated sexual assault cases; and

(3) allowing his misconduct to permeate the proceedings. However, Ward failed to raise his prosecutorial misconduct claims on direct appeal and the state habeas court held under Texas law, the claims are therefore procedurally defaulted. *See* Pet. Ex. 7 at 9 (citing Ex parte Banks, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989)). As such, Ward is procedurally barred from raising in a federal habeas petition. *See Sawyer v. Whitley,* 505 U.S. 333, 338 (1992) (holding federal courts cannot consider the merits of a habeas claim where the state courts denied habeas relief due to procedural default under state law).

II. Trial Court Error

Ward also argues he is entitled to habeas relief because the trial court refused to include the conditions and terms of probation in the jury charge. The crux of this argument is a curative instruction in the charge could have ameliorated the prejudice generated by the prosecutor's threatening implication that jurors names could be put on a yard sign in a sex offenders front yard. The Court addresses and grants habeas relief below based on the trial counsel's failure to timely seek such a curative instruction.

III. Ineffective Assistance of Counsel

Ward claims his counsel provided constitutionally ineffective assistance, citing several examples of egregiously poor decisions and actions on the part of his attorney. However, the state habeas trial court held Lowe provided effective assistance and the Court of Criminal Appeals affirmed based on the trial court's findings. As the Court explained above, this Court can only review the

state court's conclusion Lowe provided effective assistance, not its reasoning, in determining whether it is contrary to or involved in a misapplication of clearly established federal law. *Neal,* 286 F.3d at 246. In the context of claims for ineffective assistance of counsel, that means a federal court must presume, even if the state habeas court renders its decision without written opinion, the state court applied the well-known *Strickland* analysis. *Catalan v. Cockrell,* 315 F.3d 491, 493 (5th Cir. 2002). In this case, the state habeas trial court did apply *Strickland* to its factual findings and concluded Lowe was not constitutionally ineffective. *See* Pet. Ex. 7 at 9. Thus, the question the Court must answer is whether state habeas courts' application of *Strickland* is contrary to or involved a misapplication of clearly established federal law. *Id.*

A state court decision is contrary to clearly established federal law if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court decision is "an unreasonable application of clearly established" Supreme Court precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. The inquiry into unreasonableness is objective. *Id.* at 409-10. A state court's incorrect application of clearly established Supreme Court precedent is not enough to warrant federal habeas relief; in addition, such an application must also be unreasonable. *Id.* at 410-12.

Under *Strickland,* to prove an attorney's assistance ineffective, Ward must show (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 686-692 (1984). To establish deficient performance, Ward must show his attorney's representation "fell below an objective standard of reasonableness" judged in light of "the facts the particular case, viewed as of the time of counsel's conduct." *Id.* at 688, 690. The attorney's conduct is reviewed with great deference, and there is a strong presumption counsel has exercised reasonable professional judgment. *See Lockhart v. McCotter,* 782 F.2d 1275, 1279 (5th Cir. 1986), *cert. denied,* 479 U.S. 1030 (1987). To establish prejudice, Ward must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland,* 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

In this case, Ward argues the following actions and inactions on the part of his counsel constituted deficient performance and prejudiced the outcome of his case: (1) abandoning a viable motion to suppress before advising Ward to plead guilty; (2) permitting Ward to give a handwritten, detailed personal history that included admissions to several extraneous drug offenses to the mental health expert or permitting him to do so with out [sic] at least redacting the highly prejudicial material first; (4) failing to prevent the defense mental health expert from delivering the detailed personal history to the prosecution pursuant to a pretrial subpoena; (5) failing to object to the introduction into evidence of the detailed personal history or at least the admissions to drug offenses within

it; (6) failing to object to and prevent the prosecution's badgering of the defense expert psychiatrist and Ward; (7) failing to object to the prosecution's introducing into evidence videotapes of adult pornography and photographs depicting adults engaging in bestiality; (8) failing to ask for a mistrial or at least a curative instruction when the prosecutor threatened the jury; (9) failing to object to testimony presented by the prosecution that juries in Williamson County never sentenced sex offenders to probation; (10) failing to object to improper jury argument by the prosecutor; (11) undermining his own credibility with the jurors during closing argument; and (12) committing multiple deficient acts throughout the proceedings.

A. Pre-Plea Allegations

Ward contends Lowe was ineffective because he abandoned a meritorious motion to suppress. A habeas petitioner who pled guilty can only raise a claim of ineffective assistance of counsel with regard to his representation during the guilt phase of the criminal proceedings "insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea." *Smith v. Estelle,* 711 F.2d 677, 682 (5th Cir. 1983), *cert. denied sub nom. Smith v. McKaskle,* 466 U.S. 906, 104 S.Ct. 1685 (1984). For instance, in *Smith v. Estelle,* the Court found the defendant's plea was knowing and voluntary, and therefore held his claims of ineffectiveness unrelated to the guilty plea were waived including the attorney's alleged failure to review the prosecutor's file to verify laboratory test, to investigate witnesses, or to investigate the legality of the defendant's arrest. *Id.* Because Ward has not made a showing his plea was involuntary, his claim his counsel was ineffective for

failing to challenge the search and seizure of his computer files before he pled guilty is barred.

B. Sentencing Phase Allegations

The remainder of Ward's complaints about Lowe relate to errors he made during the sentencing phase of the criminal proceedings. Of the several post-plea incidents Ward cites as evidence of Lowe's deficient performance, the following are so egregious, they can be said to "[fall] below an objective standard of reasonableness"[1]: (1) permitting Ward to hand over a personal history containing confessions to extraneous drug offenses to his mental health expert and then failing to invoke attorney-client privilege to prevent the State from obtaining them and their eventual admission into evidence; (2) failing to object to the prosecution's introducing into evidence videotapes of adult pornography and adults engaging in bestiality; (3) failing to ask for a mistrial or at least a curative instruction when the prosecutor threatened the jury; (4) failing to object to testimony presented by the prosecution that juries in Williamson County never sentenced sex offenders to probation; and (5) failing to object to the prosecutor's improper jury argument.

1. Threats to the Jury

Ward contends it was deficient performance for his attorney not to immediately request a mistrial, or at the very least an instruction to disregard, when the prosecution threatened the jurors. During the prosecution's cross

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[1] *Strickland*, 466 U.S. at 688.

examination of the defense mental health expert, the following exchange took place:

Q: You also talked in terms of saying that some Judges have even required a sex offender to put a sign in their yard, right?

A: Correct.

Q: With respect to – And you've indicated that at least some of these sex offender you've worked with juries to give them probation, right?

A: Correct.

Q. Have you ever had a Judge that would require not only the sign to be put out there by the names and addresses of the jury members that gave him the probation, put those –

Mr. Lowe: I object to that, your Honor. That is entirely improper.

[Prosecutor]: Why would it be improper?

Mr. Lowe: To suggest that the names of the jurors should somehow – that somebody is supposed to publicize the names of the jurors in a case of this nature?

[Prosecutor]: It's public information.

Mr. Lowe: Of course, it's public information, but it's an obvious threat to the jury. The Court: Could you restate your question for me?

[Prosecutor]: Yes.

Q: You came in and talked about in direct examination about how that some Judges even, by golly, make a sex offender put a sign out in their yard, right?

A: That's correct.

Q: My question to you is this – And you also said that you at least some have cases where juries recommend probation, and probation is given.

A: Correct.

Q: In those types of cases, I'm asking you: Have you ever had a judge write down on that sign – list the names of the jurors and their addresses and telephone numbers that gave him probation?

Mr. Lowe: Same objection, your Honor.

The Court: I am going to sustain the objection.

Trial Tr., Vol. 2 at 305-307. Although Lowe objected to the prosecutor's questions, he did not ask the Court for an instruction at that time. He later had "more and more trouble about the jurors names on the signs" and asked the Court to instruct the jury to disregard the question, which the Court declined to do on the basis the request was untimely. Trial Tr., Vol. 2 at 374-75.

Lowe testified he did not ask for a question to disregard at the time he objected to the prosecutor's threatening questions because (1) he did not want to call the jurors attention to the question again, (2) he did not believe the instruction would be more effective than the sustaining of

his objections, and (3) the question was never answered and so there was nothing more than the question for the jury to disregard. Pet. Ex. 3. ("Lowe Aff.") at ¶ 13. Lowe claims he did not intend to ask for a mistrial because he "felt like Mr. Ward had received a fair trial and would not get any better opportunity to be heard" and so there was no point to request the instruction. *Id.* at ¶¶ 14-15. Lowe explained a second trial would enable the prosecutor to gather additional information for cross-examination and some of his witnesses were waffling in their testimony. *Id.* He admits he later changed his mind about requesting a mistrial and asked for a curative instruction, which the Court denied as untimely. Lowe Aff. ¶ 15.

The Magistrate Judge and state habeas courts deferred to Lowe's "strategy" and held his failure to secure an instruction and ask for a mistrial were not deficient. The Court disagrees and considers the Magistrate's (and the state habeas courts') conclusion Lowe's conduct was not deficient because he was acting pursuant to a strategy to avoid a mistrial an unreasonable application of *Strickland.* Although it is true that there is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance" and should usually be considered sound trial strategy, the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms," as *Strickland* requires. *Lyons v. McCotter*, 770 F.2d 529, 533 (5th Cir. 1985). The Magistrate Judge is surely right that in some situations, it maybe advisable not to seek a mistrial. In this instance, however, where the jurors heard the threatening question repeated twice but heard no answer to the question and so were left to wonder about whether their names could be put on signs in Ward's front yard, the

decision not to at least ask for an instruction was unreasonable and may have made some jurors fearful to sentence Ward to probation. Lowe's post-hoc justification that he did not think Ward could get a better hearing when a new trial would be one in which the jurors were not threatened is objectively unreasonable. Because Ward has demonstrated deficient performance and prejudice, and the state habeas court unreasonably applied *Strickland* in holding otherwise, Ward is entitled to habeas relief on this claim.

2. Extraneous Drug Offenses

Lowe asked Ward to prepare a personal written history for the defense mental health expert, psychiatrist Collier Cole, M.D. Ward contends Lowe should have prevented him from giving his personal history, which contained the highly prejudicial and irrelevant evidence of several extraneous drug offenses, to Dr. Collier or that he should have at least redacted the portions related to the drug offenses before giving the history to the expert. Ward also claims it was deficient performance not to intervene and argue attorney-client privilege prohibited delivery of Dr. Collier's records (including the history that contained admissions to drug offenses) to the prosecution in response to the prosecution's subpoena and to fail to object to the admission of the drug offenses at trial.

In his affidavit, Lowe explained after he received the history from Ward, "decided it should be used by the expert and be heard by the jury." Pet. Ex. 3 ("Lowe Aff.") at ¶ 10. He further stated he "explained all of this to Mr. Ward and he understood our strategy would result in the disclosure of this information to an expert who would ultimately be disclosing it to the prosecutor and a jury." *Id.*

Lowe claims their strategy was one of openness, specifically "to convince the jury Ward was admitting guilt, admitting everything about his life, accepting responsibility, and ready for treatment." *Id.* at 9.

In deference to his strategy of openness, the state habeas courts and Magistrate Judge declined to find Lowe deficient for permitting Ward to give his admissions to several drug offenses to the defense expert and for letting the prosecutor and eventually jury obtain that evidence of his drug use. While the Magistrate Judge admitted "[g]enerally, confession to prior drug offenses could be viewed as inadvisable," he concluded "Lowe's strategy of openness was designed to show the jury Ward has accepted responsibility for his offenses and was ready for treatment." As the Court explained above, habeas court afford much deference to strategic decisions on the part of trial counsel, but those decisions must nonetheless be reasonable to not be considered deficient performance under *Strickland*. *Lyons,* 770 F.2d at 533. While the state habeas courts and the Magistrate Judge were correct not to second guess Lowe's decision to be open with the jury about Ward's offenses in the hopes the jurors would see that see [sic] the openness and contrition as evidence of his ability to be rehabilitated, the fact that Lowe claims he made a decision in furtherance of that openness strategy does not preclude the courts from reviewing whether the decision was reasonable under *Strickland*. In this case, Lowe could have attempted to convince the jury Ward was capable of rehabilitation by having him disclose everything relevant to his sexual assault and child pornography charges without presenting evidence that he engaged in illegal drug use and sold illegal drugs, which is not only very prejudicial but highly irrelevant and most likely

would have been excluded. *Cf. Lyons*, 770 F.2d at 534 (holding defense counsel's assistance ineffective where he introduced into evidence the defendant's criminal record where it most likely would have been excluded).

This case is distinguishable from *Robinson v. Johnson*, 151 F.3d 256 (5th Cir. 1998), cited by the Magistrate Judge. In that case, it was strategic for the defense counsel to provide the report of a prior expert to the prosecution because the prosecutor would have been aware of the prior report and the defense counsel wanted to deflect any criticism of the current expert on cross-examination that he did not have all of the information. *Id.* at 260. In this case, the only reason the prosecutor and jury ever knew about the prior drug offenses was because defense counsel let Ward disclose it and then did nothing to prevent the jury or prosecutor finding out about it. As Professor Michael Tigar states in his affidavit, "it is nonsense to say that a defendant who wishes to present psychiatrist must accept the need to tell the jurors about every instance of unadjudicated misconduct in his or her past." Pet. Ex. at 5 at 4. Even if Lowe thought it was helpful for the expert to know about the drug use, he could have in a motion in limine *out of the presence of the jury* argued the extraneous drug offenses were irrelevant and yet highly prejudicial. The state habeas court's wholesale acceptance of Lowe's "openness" justification without an analysis of the reasonableness of the individual decisions made a purported furtherance of that strategy is a misapplication of *Strickland*. Because Ward has shown his counsel's decisions were unreasonable and therefore his performance deficient, and there is a likelihood that the jurors were influenced in their sentencing by their knowledge of Ward's

illicit drug offenses, Ward is entitled to habeas relief on this claim.

3. Bestiality Photographs & Adult Pornography Videotapes

Ward also argues Lowe provided ineffective assistance when he failed to object to the admission of adult pornographic videotapes and pictures of adults engaging in bestiality. Once again, in deference to Lowe's claim he was engaging in a strategy of openness, the state habeas court and the Magistrate Judge held Lowe's failure to object did not constitute deficient performance. However, as he Court discussed in the context of the extraneous drug offenses, Lowe's simply claiming his decision was related to his strategy of openness does not insulate it from evaluation for objective reasonableness. Again, Ward could have been completely open about his past illegal conduct and still objected to the introduction into evidence of videotapes of adult pornography, irrelevant to the charges of child pornography but likely to offend and prejudice some jurors. Similarly, Ward could have whole heartedly and sincerely taken responsibility for the charged crimes – possession of child pornography and sexual assault of the victim children – even if Lowe had argued outside the presence of the jury that images bestiality would very prejudicial and irrelevant. *See United States v. Harvey*, 191 F.2d 981, 996 (2nd Cir. 1993) (stating the evidence of bestiality was likely to "create disgust and antagonism toward [the defendant]" and concluding it was [sic] be highly prejudicial). The admitted evidence was likely to offend the [sic] at least some jurors and impact Ward's sentence and therefore Ward has demonstrated prejudice and Ward is entitled to habeas relief on this claim.

4. Testimony About Williamson County Juries

Ward also contends Lowe provided constitutionally ineffective assistance when he did not object to the testimony of Marty Griffith, Assistant Director of the Probation Department for Williamson County. From Griffith, the prosecution elicited testimony that of the 4,100 offenders on probation in Williamson County, none were on probation granted by a jury for aggravated sexual assault. Trial Tr., Vol. 4. at 599-600. Griffith also testified he was not aware of any Williamson County jury granting probation to an aggravated sexual assault perpetrator in his eighteen years of experience. Trial Tr., Vol. 4. at 601.

Again, the Magistrate Judge and state habeas court deferred to Lowe's "strategy of openness" and his proffered excuse that he did not object to this testimony about the conduct of other Williamson County juries because he "did not want to give the jury the impression Mr. Ward was trying to hide anything." Lowe Aff. ¶ 16. Again, attorneys who reasonably employ a strategy of openness about a defendant's *background* would not have any objectively reasonable motivation to permit a jury to hear about the decisions of other juries who sentenced other defendants charged with similar offenses. Such evidence was irrelevant to the question of what the jurors should do in Ward's case and could easily have influenced jurors to inappropriately base their decision on the general practice of others in their community. The Magistrate Judge noted that the evidence was brief and therefore unlikely to be prejudicial. The Court disagrees, especially in light of the prosecutor's reemphasis of the evidence in closing argument by alluding

to what juries Williamson County, as opposed to other less savory places, do.[2] Lowe has shown cause and prejudice and the state habeas court applied *Strickland* unreasonably in determining otherwise. Ward is entitled to habeas relief for this instance of ineffective assistance as well.

5. Improper Jury Argument

Ward complains that Lowe's failure to object to improper jury argument by the prosecutor also constitutes deficient performance. Specifically, Ward maintains Lowe should have objected to: (1) the prosecutor's improper plea to religion; (2) the prosecutor's improper speculation on the probation rates and the conditions in Galveston County; (3) the prosecutor's introduction into evidence of irrelevant and unfairly prejudicial facts not in evidence regarding attitudes in Williamson County regarding drug offenses; and (4) the prosecutor's improper focus on community expectations in Williamson County, and specifically his attempt to introduce the specter of race and implication Ward was trying to buy justice.

Once again, the Magistrate Judge held it did "not find the state habeas court's deference to counsel's strategic decisions unreasonable." And once again, this Court finds the state habeas court unreasonably applied *Strickland* since it apparently deferred to any decision Lowe made as long as he later justified it as part of a "strategy" without any inquiry into the professional reasonableness of the decision and strategy. The Court holds Lowe was deficient for at least not objecting to the prosecution's argument in response to Ward's claim he was attempting to rehabilitate

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[2] See discussion, *infra*, at 17-18.

that even though Christ forgave the thief next to him when he was dying on the cross, he still "let the thief pay for the crime he committed" and the prosecution's arguments about the difference in the severity of punishment doled out by Williamson County versus Galveston County juries and juries from the Rio Grande Valley.

As the Court has explained, Ward was attempting to convince the jury he was capable of rehabilitation. To that end, Lowe elicited testimony from witnesses about Ward's return to religion. Trial Tr. Vol. 3, at 585-87. Lowe claims he did not object to the following argument because he felt it was invited by his introduction of evidence Ward had become religious:

> I think Ward was sincere. I don't think that's the issue. I think his uncle is sincere. I don't that that's the issue. As I remember it, and I don't have the actual chapter and verse, – but as I remember it, when Christ was crucified there were two thieves on each side of Christ, and they asked for forgiveness. They did that, or at least – Maybe it was just one. But one of them did that, and Christ said, "You're forgiven." And I think that Ben Ward can and probably has been forgiven. But Christ didn't take the thief off that tree. Christ let the thief pay for the crime he committed, and I think that's important.

Trial Tr. Vol. 4, at 641. Of course, it is not professionally unreasonable to choose not to make frivolous objections or futile arguments. *See Koch v. Puckett,* 907 F.2d 524, 527 (5th Cir. 1990). However, while the prosecutor could certainly have properly rebutted Ward's contention he was now religious, perhaps with evidence Ward was lying or never went to church, this argument is not a rebuttal about Ward's nature. The prosecutor here did more than

just appeal to the jury to act as the conscience of the community. *Cf. United States v. Sanchez-Sotelo,* 8 F.3d 202, 211 (5th Cir. 1993). Here the prosecutor is imputing an intention to Christ and asking the jurors to follow his own personal (and questionable) interpretation of a Biblical passage instead of the evidence before them. It was unreasonable for Lowe not to object to such inflammatory argument, which was likely to influence the jurors to behave improperly and therefore prejudice Ward. As such, Ward has demonstrated deficient performance and prejudice.

As the Court stated above, the prosecution also alluded in closing argument to the difference in the severity of punishment doled out by Williamson County juries versus Galveston County juries and juries from the Valley. Specifically, he argued:

> When I asked [Dr. Cole] questions, man, he went off on all kinds of tangents. And when I asked him what percentage of the probationers that they got were from juries, he didn't have that statistic. And then he got to throwing around, "It's pretty big, maybe a third." I bet my paycheck it wasn't a third. And if it is then maybe that's what wrong with Galveston County because there's a lot of Galveston County that's not that beach, folks, that we see. You go down there an look at the ghettos and the problems that they have in Galveston County proper and in Galveston itself. Get off that beach and get into their town and you'll realize that it isn't Williamson County. Maybe that's what the deal is. Maybe their juries do give probation. But I've got news for you. It's not the type of thing that ought to be happening in Williamson County.

Trial Tr. Vol. 4, at 649-50. The prosecutor continued:

> And [Ward] gets into a situation where he begins to use marijuana and used it heavily daily and then begins to sell marijuana. And, yes, we have lawyers coming up here all the time from the valley saying what are you people doing trying to send these people to the pen for just a few pounds of marijuana, selling a few pounds of marijuana, because they think that's chicken feed, you know? Well, we don't. We think in our county if you want to sell a few pounds of marijuana, you get to go to the pen. Is that something bad? Do y'all like living where you're living? Do y'all want to live in the valley-type situation where several hundred pounds of marijuana may be an offense? Or do you like living where you are and raising your kids where you are because of the fact that the law enforcement and the good people of this community tow [sic] the line and expect others to tow [sic] the line?

Trial Tr. Vol. 4, at 652-53. Ward contends he was prejudiced by these arguments and that it was unreasonable for Lowe not to object to them since they involved improper speculation and introduced facts not in evidence about Williamson County juror attitudes toward drug offenses. This Court agrees. Again, the prosecutor went far beyond inviting the jury to act as the conscience of the community and his remarks, which were an invitation for the jurors to act on their prejudices and fears instead of the evidence, probably influenced the jury's ultimate sentence.

C. Concluding Remarks on Prejudice

The Court is aware of the horrifying facts of the crimes Ward committed and there is a chance the jury

imposed its sentence on the basis of those facts alone. However in this case, to hold there is not "a reasonable probability" that the combination of Lowe's several significant errors impacted the outcome of Ward's proceedings, would equate to holding that any representation, no matter how poor, is adequate in a case where the crime committed is bad enough. *See Strickland*, 466 U.S. at 694 holding to establish prejudice, one must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different" and defining "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."). The state habeas court applied *Strickland* unreasonably in concluding otherwise, and Ward is entitled to a new sentencing trial.[3]

In accordance with the foregoing:

IT IS ORDERED that the Report and Recommendation of the United States Magistrate Judge [#15] is REJECTED with regard to Ward's claims for relief based on his counsel's ineffective assistance; and

IT IS FURTHER ORDERED that Bernard James Ward's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 [#1] is CONDITIONALLY GRANTED with regards

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[3] The Court warns Ward with the old adage, "be careful what you wish for – you might get it." Counsel's errors were so numerous and serious, the Court must hold there is at least a reasonable probability the errors effected the ultimate sentence the jury handed down in this case. However, considering the track record of Williamson County juries and the nature of the charges against Ward, there seems an equally reasonable probability that a different Williamson Country jury could hand down a longer sentence.

to his sentence in Cause Nos. 96-624-K368 & 96-625-K368 in the 368th Judicial District Court of Williamson County.

SIGNED this the 12th day of September 2003.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-51352

Bernard James Ward, Jr.

Petitioner-Appellee-Cross-Appellant,

versus

Doug Dretke, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division

Respondent-Appellant-Cross-Appellee.

Appeals from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Oct. 26, 2005)

(Opinion 8/9/05, 5 Cir., ___, ___ F.3d ___)

Before REAVLEY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

PER CURIAM:

Bernard J. Ward, Jr., in his Petition for Rehearing En Banc, asks this Court to reconsider its decision in *Spriggs*

v. Collins[1] in light of the United States Supreme Court's decision in *United States v. Glover*.[2] In *Spriggs*, we held that in order to prove prejudice under *Strickland v. Washington*,[3] a petitioner must show "a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been *significantly* less harsh."[4] In *Glover*, the Supreme Court considered a similar standard,[5] as applied to sentences imposed under the federal sentencing guidelines, and held that the Seventh Circuit "erred in engrafting [an] additional requirement onto the prejudice branch of the *Strickland* test."[6]

Thus far, we have limited *Glover's* reach to sentences under the federal sentencing guidelines,[7] but we have repeatedly noted that the Supreme Court may have "cast doubt" on that conclusion.[8] The Supreme Court offers language supporting a rejection of the *Spriggs* standard, even as applied to discretionary sentencing schemes. The

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[1] 993 F.2d 85 (5th Cir. 1993) (per curiam).

[2] 531 U.S. 198 (2001).

[3] 466 U.S. 668 (1984).

[4] *Spriggs*, 993 F.2d at 88.

[5] *See Durrive v. United States*, 4 F.3d 548, 551 (7th Cir. 1993) (adopting *Spriggs's* "significantly less harsh" standard and applying it to sentences imposed under the federal sentencing guidelines).

[6] *Glover*, 531 U.S. at 204.

[7] *See United States v. Grammas*, 376 F.3d 433, 438 n.4 (5th Cir. 2004) ("Thus, we emphasize that our adoption of the *Glover* "any amount of jail time test only applies to cases involving the federal guidelines.").

[8] *See Daniel v. Cockrell*, 283 F.3d 697, 706-07 n.17 (5th Cir. 2002) (recognizing that "in [*Glover*], the Supreme Court arguably cast doubt on the *Spriggs* "significantly less harsh" rule and may have impliedly rejected it in total"); *see also United States v. Ridgeway*, 321 F.3d 512, 515 n.2 (5th Cir. 2003) (same).

Court stated categorically that "any amount of actual jail time has Sixth Amendment significance."[9] Moreover, the Court's reasons for rejecting the Seventh Circuit's rule are equally applicable to discretionary sentencing schemes: First, "there is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice."[10] Second, "it is not even clear if the relevant increase is to be measured in absolute terms or by some fraction of the total authorized sentence."[11]

If this language were taken to its logical extreme, *Spriggs's* "significantly less harsh" requirement would be inappropriate. Other language in *Glover* points toward the opposite conclusion, suggesting that the Court's holding is limited to errors falling under the federal sentencing guidelines or other determinate systems of constrained discretion. The Court states:

> Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a determinate system of constrained discretion such as the Sentencing Guidelines[,] it cannot serve as a bar to a showing of prejudice. Compare

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[9] *Id.* at 203 (citing *Argersinger v. Hamlin*, 427 U.S. 25 (1972) (holding that counsel must provided when a defendant is tried for a crime that results in a sentence of imprisonment) and *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that a criminal defendant has no Sixth Amendment right to counsel when his trial does not result in a sentence of imprisonment)).

[10] *Id.*

[11] *Id.*

> *Spriggs v. Collins*, 993 F.2d 85, 88 (C.A.5 1993) (requiring a showing that a sentence would have been "*significantly* less harsh" under the Texas discretionary sentencing scheme), with *United States v. Phillips*, 210 F.3d 345 (C.A.5 2000) (finding prejudice under the Sentencing Guidelines when an error by counsel led to an increased sentence).[12]

Here, the Court suggests that reviewing courts can take into account the amount of increase in sentence when determining prejudice under *Strickland*,[13] contrary to the Court's holding that any additional jail time constitutes prejudice.[14] The citation to *Spriggs*, and the limiting parenthetical limiting, suggests that *Spriggs's* "significantly less harsh" standard survives, but only as applied to discretionary sentencing schemes. Moreover, the Supreme Court failed to address the underlying concern in *Spriggs* – namely, that without requiring a "significantly less harsh" sentence, inquiry into *Strickland* prejudice becomes an "automatic rule of reversal" because "practically any error committed by counsel could have resulted

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[12] *Glover*, 531 U.S. at 204.

[13] This is consistent with our approach in *Spriggs*, which provided a variety of factors for reviewing courts to consider. *Spriggs*, 993 F.2d at 88 ("In deciding whether such prejudice occurred, a court should consider a number of factors: the actual amount of the sentence imposed on the defendant by the sentencing judge or jury; the minimum and maximum sentences possible under the relevant statute or sentencing guidelines[;] the relative placement of the sentence actually imposed within that range[;] and the various relevant mitigating and aggravating factors that were properly considered by the sentencer.").

[14] *Glover*, 531 U.S. at 204 (holding that in a case in which the claimed error resulted in a 6-21 month longer imprisonment, "it is clear that prejudice flowed from the asserted error in sentencing").

in a harsher sentence, even if only by a year or two."[15] Absent more compelling instruction from the Supreme Court, we decline to reconsider the *Spriggs* approach at this time.

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

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[15] *Spriggs*, 993 F.2d at 88.